LAW REPORTS OF TRIALS OF WAR CRIMINALS

Selected and prepared by

THE UNITED NATIONS
WAR CRIMES COMMISSION

VOLUME VII

LONDON
PUBLISHED FOR
THE UNITED NATIONS WAR CRIMES COMMISSION
BY HIS MAJESTY'S STATIONERY OFFICE

1948

Price 5s. 0d. net

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One of the aims of this series of Reports is to relate in summary form the course of the most important of the proceedings taken against persons accused of committing war crimes during the Second World War, apart from the major war criminals tried by the Nuremberg and Tokyo International Military Tribunals, but including those tried by United States Military Tribunals at Nuremberg. Of necessity, the trials reported in these volumes are examples only, since the trials conducted before the various Allied Courts number well over a thousand. The trials selected for reporting, however, are those which are thought to be of the greatest interest legally and in which important points of municipal and international law arose and were settled.

Each report, however, contains not only the outline of the proceedings in the trial under review, but also, in a separate section headed " Notes on the Case ", such comments of an explanatory nature on the legal matters arising in that trial which it has been thought useful to include. These notes provide also, at suitable points, general summaries and analyses of the decisions of the courts on specific points of law derived primarily from a study of relevant trials already reported upon in the series. Furthermore, the volumes include, where necessary, Annexes on municipal war crimes laws, their aim being to explain the law on such matters as the legal basis and jurisdiction, composition and rules of procedure on the war crime courts of those countries before whose courts the trials reported upon in the various volumes were held.

Finally, each volume includes a Foreword by Lord Wright of Durley, Chairman of the United Nations War Crimes Commission.

continued inside back cover

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FOREWORD

This Volume contains a number of important cases which illustrate the application of the law of war crimes to different circumstances and acts. It also illustrates very usefully how the international law of war and war crimes is dealt with by military courts on the one hand, and by the national courts on the other. The results in either case ought to be substantially the same because the ultimate decision must depend on rules of international law. In the national court the national criminal law primarily applies, but it is necessary to modify it in order to give effect to the appropriate rules of international law. To a large extent this rule is in favour of the accused men. Generally speaking, what they were found guilty of doing would be an obvious and simple crime according to the national law of peace in practically every civilized state. But the accused are entitled to rely on whatever defences they can extract from the international law of war. Thus, what would be murder in time of peace may be justified as done in accordance with the laws of war. If, however, on a closer examination it appears that the laws of war do not afford justification for what is primarily murder under the national law of peace, then the charge of murder remains unqualified and the defence fails. It is for the reason that this important rule is illustrated by the cases in this volume, that I think they require a close study and attention. Many of the offences were committed against non-combatants in occupied territories so that they were crimes within the scope of the IVth Hague Convention of 1907. Where, however, the offences were committed not in occupied territory but in Germany, the victims had been brought into Germany from their own countries which were at the time under German occupation, and in that way the principle of the Hague Convention is satisfied even apart from the general scope given by the famous clause in the Preamble which makes reference to the laws of humanity. The very significant case concerning the Velpke Children's Home has special peculiarities of its own, because the children who were barbarously dealt with were actually born in Germany, their mothers having been deported contrary to international law from an Allied country, namely Poland, while that country was occupied by the Nazis. The main topics dealt with in the Reports in this Volume can be usefully classified under three heads : deportation and slave labour ; medical experiments on Allied prisoners of war and unwilling non-combatants ; and causing death by criminal negligence of the children in the Velpke Children's Home case.

I shall not prolong this Foreword by dealing with what has been very fully and clearly dealt with by Mr. Brand and his colleagues who have co-operated with him in the production of this volume.

Mr. Brand, as well as assuming the general editorship as heretofore, has prepared the Reports on the Milch Trial and the Velpke Children's Home Trial. The other Reports have been prepared by Dr. Litawski (those on the trials of Goeth and Hoess) and Dr. Zivkovic (those on the trials of Becker and others and of Lex). The Annex on Polish Law has been prepared by Dr. Litawski.

WRIGHT.

London, *September*, 1948.

CASE NO. 37

TRIAL OF HAUPTSTURMFÜHRER AMON LEOPOLD GOETH

COMMANDANT OF THE FORCED LABOUR CAMP NEAR CRACOW.
SUPREME NATIONAL TRIBUNAL OF POLAND, CRACOW
27TH–31ST AUGUST AND 2ND–5TH SEPTEMBER, 1946

Criminal Organizations. Genocide. The Defences of Superior Orders, Military Necessity and Non-applicability of the Law.

A. OUTLINE OF THE PROCEEDINGS

1. THE INDICTMENT

It was charged that the accused Amon Leopold Goeth, an Austrian subject, as a member of the NSDAP and of the " Waffen SS " took part in the activities of the criminal organizations. The former was described as an organization which under the leadership of Adolf Hitler, through aggressive wars, violence and other crimes, aimed at world domination and establishment of the national-socialist régime. The accused personally issued orders to deprive of freedom, ill-treat and exterminate individuals and whole groups of people, and himself murdered, injured and ill-treated Jews and Poles as well as people of other nationalities. In particular it was charged that :

(1) The accused as commandant of the forced labour camp at Plaszow (Cracow) from 11th February, 1943, till 13th September, 1944, caused the death of about 8,000 inmates by ordering a large number of them to be exterminated.

(2) As a SS-Sturmführer the accused carried out on behalf of SS-Sturmbannführer Willi Haase the final closing down of the Cracow ghetto. This liquidation action which began on 13th March, 1943, deprived of freedom about 10,000 people who had been interned in the camp of Plaszow, and caused the death of about 2,000.

(3) As a SS-Hauptsturmführer the accused carried out on 3rd September, 1943, the closing down of the Tarnow ghetto. As a result of this action an unknown number of people perished, having been killed on the spot in Tarnow ; others died through asphyxiation during transport by rail or were exterminated in other camps, in particular at Auschwitz.

(4) Between September, 1943, and 3rd February, 1944, the accused closed down the forced labour camp at Szebnie near Jaslo by ordering the inmates to be murdered on the spot or deported to other camps, thus causing the death of several thousand persons.

(5) Simultaneously with the activities described under (1) to (4) the accused deprived the inmates of valuables, gold and money deposited by them, and appropriated those things. He also stole clothing, furniture and other movable property belonging to displaced or interned people, and sent them to Germany. The value of stolen goods and in particular of valuables reached many million zloties at the rate of exchange in force at the time. For those acts the accused was arrested by the German authorities on 13th September, 1944, but he was not brought before any German court. He was later extradited to Poland by the Allied authorities in Germany.

2. THE GENERAL BACKGROUND OF THE CASE

The case and evidence for the Prosecution can be summarized as follows.

The criminal activities of the accused Amon Goeth in the Cracow district were but a fragment of a wide action which aimed at the extermination of the Jewish population in Europe. This action was to be carried out by stages. In the first stage the personal and economic freedom of the Jews was only partly restricted ; then they were completely deprived of personal freedom and confined in so-called ghettoes. From there they were gradually transferred to concentration camps and eventually murdered in a wholesale manner by shooting and in gas-chambers. Large numbers of Jews perished in each stage of this action also through inhuman treatment and torture or were individually murdered by German and Ukrainian henchmen.

In the Cracow district, the best known were the ghettoes in Cracow and Tarnow, both of which had been liquidated in an inhumane way by the accused.

The Cracow ghetto was set up on 21st March, 1941, and contained at the outset over 68,000 inmates. Its setting up was preceded by a long series of regulations progressively limiting the rights of the Jewish population. Already on 8th September, 1939, the German authorities ordered all Jewish enterprises to be marked with a star of David. This exposed the owners to robberies and persecutions. On 10th October, 1939, Municipal Registration Offices were ordered to register the Jewish population on special registration forms marked with a yellow band.

On 26th October, 1939, the Governor-General, Dr. Hans Frank, issued a proclamation stating in no uncertain terms that there would be no room for the " Jewish exploiters " in the territories under German administration.

On 26th October, 1939, Dr. Hans Frank introduced compulsory labour for the Jewish population and ordered the setting up of special Jewish labour battalions. The carrying out of this order was entrusted to his deputy for security affairs (der Höhere SS und Polizeiführer).

The registration of Jews began on the orders of the German Secret Police, the Gestapo, in November, 1939, first in Cracow and later on in other localities. In the same month all Jewish banking accounts had been frozen and the order as to the marking of Jewish shops and enterprises repeated. In order to facilitate German plans, Jewish Councils were set up.

From 1st December, 1939, Jews were allowed to appear in the streets only with a star of David on their right arm. Ten days later they had been prohibited from appearing in streets and public roads between 9 p.m. and 5 a.m., without special individual permits ; and from 1st January, 1940, they had been prohibited from changing their residence without such permits. On 20th January, 1940, they had been prohibited from travelling by rail. At the same time all Jewish schools were closed down.

In December, 1939, the German authorities began to cut off Jewish districts in Cracow and other towns from the rest of the population at the same time making use of house searches to carry out wholesale robberies of gold, silver and other valuables. Street raids were becoming more and

more frequent and under various pretences all kinds of heavy fines were being imposed upon the Jews. They had to be paid at short notice under threat of executing of the Jewish Council's members or specially designated hostages.

In June, 1941, special yellow identity cards were issued to the Jews. From 15th October, 1941, they had been prohibited under the penalty of death from leaving residential districts allotted to them. From 1st December, 1941, the German post would not accept Jewish parcels and in the same month the Jews were ordered to surrender all furs in their possession. The same applied to ski-ing equipment. From 1st February, 1942, they had been prohibited from using cabs and sleighs.

Already in December, 1939, the systematic deportation of Jews from the Polish territories forcibly annexed to the German Reich and from Germany itself, and Austria, to the General Gouvernement had begun. Simultaneously Jews were being systematically concentrated in a small number of towns in order to achieve complete control over them and to facilitate their removal to death camps.

In February, 1942, the wholesale removal of Jews to death camps was initiated, combined with wholesale murdering of Jews on the spot. In that month a large scale action affecting 12,000 Jews took place in Lublin. Since then these actions became more and more frequent and drastic. The peak was reached in July and August, 1942.

During the last week of June, 1942, in the course of the liquidation of the Tarnow ghetto about 6,000 Jews were removed to Belzec death camp and nearly the same number murdered on the spot. At the beginning of September, 1943, the ghetto was completely liquidated in this way. It was then, for instance, that the accused Amon Goeth himself shot between thirty and ninety women and children and sent about 10,000 Jews to Auschwitz by rail, organizing the transport in such a way that only 400 Jews arrived there alive, the remainder having perished on the way.

In compliance with the wishes of Dr. Frank who wanted Cracow, the capital of the General Gouvernement, to be " purged " of Jews, the German authorities started in July, 1940, their forcible removal from the town. In June, 1942, a large scale action took place in the Cracow ghetto, in the course of which many murders were committed and about 5,000 Jews sent to the death camps on orders issued by Rudolf Pavlu, Stadthauptmann of Cracow. On 28th October, 1942, the barbarous evacuation of the Cracow ghetto and a further reduction of its area took place again. About 7,000 Jews were sent to the death camps and many others murdered on the spot. Of the 68,000 in summer 1940, only 14,000 Jews remained in the ghetto.

On 13th March, 1943, the final liquidation of the Cracow ghetto took place, personally supervised by SS Sturmbannführer Willi Haase and carried out by the accused Amon Goeth with the assistance of Kunde, Heinrich and Neumann, the Security Police experts on Jewish affairs. Wholesale murders were then committed on the spot. The total number of Jews murdered on this occasion reached about 4,000, among which were many women and children. Amon Goeth himself shot many people. The rest,

over 10,000 able-bodied people, were accommodated in the Plaszow forced labour camp.

Similar events had simultaneously taken place all over the General Gouvernement. At the end of 1942 the whole remaining Jewish population of the General Gouvernement found itself concentrated in the forced labour camps and in no more that 40 towns.

All these measures were accompanied by regulations threatening with the death penalty all who shelter the Jews or keep their belongings. They were followed by wholesale and organized robberies of the Jewish property.

Against this background appeared the person of the accused Amon Goeth, whose life career from the early years was inseparably bound with the Nazi movement, and who was responsible for the atrocities committed as part of a general pattern of the German policy aiming at complete extermination of the Jewish population in Europe.

The Indictment proceeded to enumerate and describe in great detail all criminal acts preferred against the accused under the charges summarized in Section 1 above.

Apart from statements given by numerous witnesses, the great majority of whom were former inmates of the ghettoes and camps already named, the case for the Prosecution was supported by evidence of the Director of the Jewish Historical Commission in Cracow, who in the capacity of an expert described to the Tribunal at great length and much detail the general policy and system of exterminating Jews, and the organization of concentration and other camps set up by the German authorities for that purpose. The Tribunal heard also as an expert Dr. L. Ehrlich, Professor of International Law in the University of Cracow, on the recent developments in the sphere of international criminal law concerning trials of war criminals.

3. THE VERDICT

The accused, who was defended by two counsel appointed by the Tribunal, pleaded not guilty and submitted some defences which will be referred to later.

The Tribunal found the accused guilty of the alleged crimes and sentenced him to death. In addition, the Tribunal pronounced the loss of public and civic rights, and forfeiture of all property of the accused.

The accused appealed for mercy to the President of the State National Council. After the President had decided not to avail himself of his prerogative of pardon, the sentence was carried out on 13th September, 1944, by hanging.

B. NOTES ON THE CASE

1. THE COURT AND THE LEGAL BASIS OF THE TRIAL

The Court was the Supreme National Tribunal for trials of war criminals, the jurisdiction and powers of which have been defined in the Decrees of

22nd January and 17th October, 1946, and in the Decree of 11th April, 1947.[1] The case was tried in Cracow.

The trial found its legal basis in the Decree of 31st August, 1944, *concerning the punishment of Fascist-Hitlerite criminals guilty of murder and ill-treatment of the civilian population and of prisoners of war, and the punishment of traitors to the Polish Nation*, as amended by the Decree of 16th February, 1945.[2]

2. THE NATURE OF THE OFFENCES

The acts committed by the accused were crimes in violation of Article 1 para. 1 (*a*) and (*b*) of the Decree mentioned above, the text of which is given in subsection (ii). These acts were also in violation of the corresponding provisions of the Polish Civil Criminal Code of 1932, concerning murder, grievous bodily harm, torture and ill-treatment, infringement of personal liberty, appropriation of property (Articles 225, 235, 236, 246, 248, 257 and 262, para. 1). The Prosecution also submitted that these crimes violated the laws and customs of war (Article 46 of the Hague Regulations) and constituted crimes against humanity.

Apart from Article 1 of the above Decree, the Tribunal based its sentence on Articles 3–5 of the said Decree concerning superior orders and duress, and additional penalties (now Articles 5 and 7 of the consolidated text of the Decree).[3] The Tribunal also applied the relevant provisions of the Criminal Code dealing with the basic principles of responsibility for criminal acts.

The nature of the offences for which the accused was sentenced raises questions on two specific points, which will be discussed in the following sections.

(i) *Criminal Organizations*

In the general part of the Indictment the accused was charged with membership in the Nazi Party and the Waffen SS, which according to this Indictment were criminal organizations, and of which he was a member until 13th September, 1944.

It is to be noted that the Indictment against Amon Goeth was lodged with the Tribunal on 30th July, 1946, that is before the pronouncement of the Nuremberg Judgment (30th September and 1st October, 1946), and at the time when the Polish war crimes legislation did not contain provisions concerning the membership of criminal organizations. These were promulgated in the Decree of 10th December, 1946.[4]

From the text of the Indictment it will also be observed that the Prosecution put a much wider interpretation upon the notion of the criminal character of the Nazi Party than it has been accepted by the Nuremberg Tribunal. Thus, the Indictment against Amon Goeth described the criminal activities of the Nazi Party as aiming, " through violence, aggres-

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(1) See the Annex, Part II, Section 1, pp. 91–92 of this volume.
(2) *Ibid*, Part I, pp. 82–91.
(3) *Ibid*, Part I, Sections 2, 4 and 5.
(4) See the Annex, Part I, Section 3, pp. 86–87, of this volume.

sive wars and other crimes, at world domination and establishment of the national-socialist régime ". On the other hand, the Nuremberg Tribunal in declaring the Nazi Party and the Waffen SS to be criminal within the meaning of the Nuremberg Charter, based its finding on the fact of the participation of these organizations " in war crimes and crimes against humanity connected with the war ".(1) It is, of course, clear that this restricted finding and the omission in this connection of crimes against peace have been based only on the evidence submitted to the Tribunal, as according to the law of the Charter, all three categories of crimes as defined in its Article 6 have a bearing on the criminality of the organizations in question.

When dealing with this particular charge, the Supreme National Tribunal accepted the fact that the accused was member of " a criminal organization " and stated that his activities were closely bound up with the activities of the organization, which acting as a criminal association set as one of its aims the annihilation of whole groups of people.

As it will be shown in more detail later the Tribunal in establishing the facts of the accused's participation in " a criminal organization " and in expressing the opinion that the Nazi Party was a criminal organization, although including some references to its purely political aims, legally connected the criminal activities of the Nazi Party with the commission of war crimes and crimes against humanity. Thus the National Tribunal based its declaration on a finding of much the same general nature as did the Nuremberg Tribunal in its Judgment delivered a few weeks later.

The sentence of the Supreme National Tribunal was pronounced on 5th September, 1946. Therefore this Tribunal had no formal legal basis either in municipal or international law on which it could base a penalty for the membership in a criminal organization. Nevertheless, it seems that, taking into account the criminal facts already established at the time by the evidence submitted to the Nuremberg Tribunal and in the present trial, as well as in the case against Gauleiter Artur Greiser,(2) the National Tribunal thought it justified to make the above declaration on the criminal character of the organizations in question. This declaration was in accordance with the trend of legal thought prevailing at that time and with the already tangible developments in the sphere of international criminal law.

Looking at the position from the point of view of the present state of international and Polish municipal law, there is no doubt that the accused's membership in the Waffen SS was definitely criminal. This is, however, not so in regard to his membership of the NSDAP as he held no party office of any kind, did not belong to the Leadership Corps of the Nazi Party which alone has been declared criminal by the Nuremberg Judgment,(3) and was merely an ordinary member of the Party. His membership as such in this organization was therefore not criminal. Actually, the legal basis on which the Tribunal inflicted the punishment in the present case, was Article 1, para. 1 of the Decree of 31st August, 1944, within the scope of which came

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(1) See the *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Cmd. 6964, pp. 71 and 79.

(2) This case, which was tried by the Supreme National Tribunal in June and July, 1946, will be reported upon in one of the subsequent volumes of this series.

(3) See the *Nuremberg Judgment*, *op. cit.*, pp. 70–71.

the offences preferred against the accused in paragraphs (1) to (4) of the Indictment, and which did not deal with the membership of criminal organizations.

(ii) *Genocide*

The above-mentioned Article 1, para. 1 of the Decree of 31st August, 1944, as amended by the Decree of 16th February, 1945, *concerning the punishment of Fascist-Hitlerite criminals guilty of murder and ill-treatment of civilian population, etc,*[1] reads as follows:

> " Any person who, assisting the German authorities of occupation:
>
> (*a*) took part in committing acts of murder, ill-treatment or persecution against the civilian population or prisoners of war;
>
> (*b*) acted to the detriment of persons wanted or persecuted by the authorities of occupation for whatever reason it may be (with the exception of prosecution for common law crimes), by sentencing, detaining or deporting them—is liable to the death penalty."

It will be noted that this provision was in substance very similar (though not quite sufficiently developed), to that of Article 1, in its final form as contained in the consolidated text of the Decree of 1944 and promulgated on 11th December, 1946, which has already been analysed elsewhere.[2] It has been submitted there that the offences which come within the scope of this Decree are, *inter alia*, war crimes and crimes against humanity as they are understood by the international enactments of 1945 and 1946.

There is no doubt that the offences preferred against the accused in the present case fall within these two notions. The Prosecution went, however, a step further on the road of the development of the international criminal law and described these offences also as the crime of *genocide*, claiming it to be a *crimen læsæ humanitatis*.

The word " genocide " is a new term coined by Professor Lemkin to denote a new conception, namely, the destruction of a nation or of an ethnic group. Genocide is directed against a national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group. According to Lemkin[3] genocide does not necessarily mean the immediate destruction of a nation or of a national group, except when accomplished by mass killings of all its members. It is intended to signify also a co-ordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide has two phases: one, the destruction of the national pattern of the oppressed group, for which the word " denationalization " was used

(1) See the Annex, Part I, Section 1, of this volume.
(2) *Ibid*, Part I, Section 2, p. 84.
(3) See R. Lemkin, *Axis Rule in Occupied Europe*, Carnegie Endowment for International Peace, Division of International Law, Washington, 1944, pp. 79-95.

in the past ; the other, the imposition of the national pattern of the oppressor. Lemkin believes, however, that the conception of denationalization is inadequate because : (*a*) it does not connote the destruction of the biological structure ; (*b*) in connoting the destruction of one national pattern, it does not connote the imposition of the national pattern of the oppressor ; and (*c*) denationalization is often used to mean only deprivation of citizenship.

To introduce and establish this new type of crime was for the first time attempted in the Nuremberg Indictment against the German Major War Criminals. The Prosecution stated therein that the defendants " conducted deliberate and systematic genocide, *viz.*, the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups, particularly Jews, Poles and Gipsies, and others."(1)

It will be observed that the Prosecution at Nuremberg, when preferring against the defendants the charge of genocide, adopted this term and conception in a restricted sense only, namely, in their physical and biological connotations. This is evident not only from the definition of genocide as stated in the Indictment and from the inclusion of this charge under the general count of murder and ill-treatment, but also from the fact that all other aspect and elements of the defendants' activities aiming at the denationalization of the inhabitants of occupied territories were made the subject of a separate charge which was described as germanization of occupied countries.

The Nuremberg Tribunal, although it dealt in great length with the substance of the charge of genocide,(2) did not use this term or make any reference to the conception of genocide. It left it to the future developments, which were soon to come, and to the subsequent labours of international bodies and jurists to define the notion of this new, and already generally recognized, crime under international law.(3)

In the present Polish trial, which was the first of the war crime cases of this kind, the Prosecution endeavoured to do much more than establish only the physical and biological aspects and elements of the crime of genocide that were involved in the criminal acts actually committed by the accused. By providing the Tribunal with ample evidence as to the general background of the accused's activities, which was summarized in the preceding part,(4) and by fully setting out the general policy and system, and the machinery set in operation by the German authorities, for the gradual elimination and final extermination of the Jewish nation, they succeeded in establishing before the Supreme National Tribunal also other components of this new type of crime, such as its economic, social and cultural connotations. The Prosecution submitted that the notion of the crime of genocide is within the scope of the Decree of 31st August, 1944, as it provides punishment of murder and ill-treatment not only of individual persons, but moreover of large groups of people persecuted on specific grounds.

(1) See the Indictment, Cmd. 6696, p. 14.
(2) See the *Nuremberg Judgment*, Cmd. 6964, pp. 50-52 and 60-64.
(3) Reference is made here to the *Resolution on Genocide* adopted by the General Assembly of the United Nations on 11th December, 1946.
(4) See pp. 2–4.

The Tribunal accepted these contentions and in its Judgment against Amon Goeth stated the following:

" His criminal activities originated from general directives that guided the criminal Fascist-Hitlerite organization, which under the leadership of Adolf Hitler aimed at the conquest of the world and at the extermination of those nations, which stood in the way of the consolidation of its power.

" The policy of extermination was in the first place directed against the Jewish and Polish nations.

" This criminal organization did not reject any means of furthering their aim at destroying the Jewish nation. The wholesale extermination of Jews and also of Poles had all the characteristics of genocide in the biological meaning of this term, and embraced in addition the destruction of the cultural life of these nations.

" The letter of the Head of the Security Police in Berlin dated 21st September, 1939, and addressed to all the ' Einsatzgruppen der Polizei ' and called ' Schnellbrief ', which contained instructions how to deal with the Jews, constitutes one of the proofs in respect of the extermination campaign. The letter established as the final goal (' Endziel ') which was to be kept secret, the complete extermination of the Jews. This end was to be achieved by stages."

The Tribunal established further that in order to achieve that aim a whole series of special orders and regulations had been issued by the German authorities in the General Gouvernement. All these measures restricted the personal and economic freedom of the Jews, and their liberty of movement and cut them off from the outside world by confining them to a continuously declining number of ghettoes. Simultaneously with the liquidation of these ghettoes the number of labour camps, gas chambers and crematoria were increased. These camps also afforded an excellent opportunity as instruments used for extermination of Poles. They included the so-called penal camps for Poles who were considered guilty of various administrative offences and were politically suspected, e.g., of taking part in the resistance movement.

The evidence submitted to the Supreme National Tribunal greatly exceeded the requirements of establishing the case against the accused himself. The prosecution aimed at proving not only that the accused was guilty of a number of crimes committed either personally, or on his orders, or with his explicit or tacit consent against numerous individuals of Jewish and Polish nationality, and against whole groups of people on political, racial or religious grounds. The Prosecution also aimed at putting on record the general German policy and system of large scale persecutions and wholesale extermination of people, of which the activities of the accused were part and parcel.

3. THE DEFENCES OF SUPERIOR ORDERS, MILITARY NECESSITY AND ALLEGED NON-APPLICABILITY OF THE DECREE

Apart from denying certain facts and trying to throw the blame upon others or diminish the extent and gravity of the crimes alleged, the accused pleaded that he was only carrying out orders and instructions received from

his superiors, which he had to obey as a military person. He also contended that the penalties he was inflicting upon the inmates, including putting them to death, were within his disciplinary jurisdiction as commandant of the camp, and were in accordance with the German regulations in force.

The Tribunal rejected this plea and based its verdict on Article 4 of the Decree of 31st August, 1944, in its former text, which read as follows :

> " The fact that any of the crimes envisaged in Articles 1 and 2 of the Decree was committed while in service of the enemy authority of occupation or on its orders, or under duress, does not exempt from criminal responsibility."(1)

In addition, the Tribunal established that a large number of crimes had been committed on the accused's own initiative.

The accused raised also the defence that his acts were legal because they were based on military necessity. The Tribunal, however, disregarded this plea. The accused, in this case had committed acts without any military justification and in flagrant violation of the rights of the inhabitants of the occupied territory as protected by the laws and customs of war and, therefore, the defence of military necessity was neither applicable nor admissible.

Finally, one of the defending Counsel submitted that the Decree of 31st August, 1944, was not applicable to the accused in view of his German nationality, as it provided only for punishment of Polish subjects who committed offences against their own co-nationals. This plea could not, however, be upheld in view of the fact that, according to Article 3 para. 1, of the Polish Criminal Code, the Polish Criminal law is applicable to all persons, irrespective of their nationality, who committed a crime on the territory of the Polish State.(2) The plea was in fact disregarded by the Tribunal.

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(1) This provision has been later amended and replaced by Article 5 of the consolidated text of this Decree, the text of which is given in the Annex, Part I, Section 4, p. 88, of this volume.

(2) See also The Annex, Part I, Section 2, p. 84, of this volume.

CASE NO. 38

TRIAL OF OBERSTURMBANNFÜHRER RUDOLF FRANZ FERDINAND HOESS

COMMANDANT OF THE AUSCHWITZ CAMP

SUPREME NATIONAL TRIBUNAL OF POLAND

11TH–29TH MARCH, 1947

Membership of the Nazi Party. Concentration Camp as a Criminal Organization. Genocide.

A. OUTLINE OF THE PROCEEDINGS

1. THE INDICTMENT

The accused Rudolf Franz Ferdinand Hoess, a German subject, was charged with the following crimes:

(1) That from 1st September, 1939, till May, 1945, in the German Reich, and from 1st May, 1940, till September, 1944, on the occupied territory of the Polish State he was a member of the German National Socialist Workers' Party (NSDAP), a criminal organization, which aimed at the subjugation of other nations through planning, organizing and perpetrating crimes against peace, war crimes and crimes against humanity, and also was a member of the SS, a further criminal organization;

(2) That from 1st May, 1940, till the end of October, 1943, as Commandant of the Auschwitz concentration camp set up by him, and thereafter from December, 1943, till May, 1945, as Head of the D.I. Department of the S.S. Central Economic and Administrative Office, as well as in June, July and August, 1944, as commander of the SS garrison at Auschwitz, in execution of the Nazi system of persecution and extermination of nations in concentration and death camps organized for the purpose, he supervised the application of that system in the Auschwitz concentration camp against the Polish and Jewish civilian population and against other nationals of the territories occupied by Germany, as well as to Soviet prisoners of war, and thereby acting either himself or through the subordinate camp personnel, he deliberately:

(i) deprived of life: (*a*) about 300,000 camp registered inmates, (*b*) about 4,000,000 people mainly Jews brought to the camp from different European countries to be killed upon their arrival, and therefore not included in the register of the camp inmates, (*c*) about 12,000 Soviet prisoners of war confined in the camp in violation of the Geneva Convention on the treatment of Prisoners of War; all this by asphyxiation in gas-chambers, shooting, hanging, lethal injections of phenol or by medical experiments causing death, systematic starvation, by creating special conditions in the camp which were causing a high rate of mortality, by excessive work of the inmates, and by other methods;

(ii) ill-treated and tortured the inmates physically and morally by various means;

(iii) supervised wholesale robbery of property, mostly jewels, clothes and other valuable articles taken from people on their arrival to the camp, and of gold teeth and fillings extracted from dead bodies of the victims.

2. THE CASE AND EVIDENCE FOR THE PROSECUTION

The Auschwitz camp occupied the most prominent position among the nine greatest concentration camps established by Nazi Germany. The most inhuman rule prevailed in the camp which caused the loss of life of nearly all inmates. Over four million people from all countries occupied by Germany met with death in the gas-chambers and crematoria installed in the camp. Soviet prisoners of war were the first victims of this extermination campaign. They were followed by Jews who perished in even larger numbers. Poles constituted the largest group of murdered from among the registered inmates of the camp. Among the victims of other nationalities there were : a few Americans and British, and large numbers of Austrian, Belgian, Bulgarian, Chinese, Czechoslovak, French, Greek, Dutch, Spanish, Jugoslav, Lithuanian, Latvian, German, Norwegian, Persian, Rumanian, Swiss, Turkish, Hungarian and Egyptian, and of other nationalities.

The camp was devised as a central concentration camp and was equipped with the largest and most efficient technical installations for the extermination of people. The highest capacity of its gas-chambers amounted to killing of 60,000 people per 24 hours and that of the crematoria to burning of 24,000 bodies per 24 hours.

The Auschwitz concentration camp was also used as a place of confinement of people considered as dangerous to the occupation authorities. Statistical sheets listing the causes of death in the camp contained nine different categories of " criminals " such as " political ", " professional ", etc., and among them one described " Poles ". Thus the latter were considered criminals, merely because of their nationality. This explains why Poles arrested by accident during street raids and not connected with any political activities were nevertheless sent to concentration camps. Soviet prisoners of war constituted a separate group in the camp. They were eliminated from the general prisoners of war camps and brought as " criminals " to the Auschwitz camp.

In the camp, the kind of living quarters, of food and clothing, unsanitary conditions, excessive work, ill-treatment and penalties which prevailed contributed to the death-rate. Medical treatment was completely lacking and illness was the ground on which people were selected for extermination. Simultaneously various means aiming at breaking the moral resistance of the inmates were applied. Their personal dignity was abased. Only a small number of individuals survived owing to exceptional powers of endurance or to fortunate accidents.

The exploitation of the inmates as forced labour took place either in branch camps or in the branches of I.G. Farben Industrie producing synthetic petrol and of Krupp's works active under the firm " Weichsel-Union ", and in other factories which had been built in the neighbourhood of Auschwitz by the inmates themselves.

The system applied to the inmates was built on patterns established in other concentration camps, but was perfected by the accused Hoess. He underwent special training in camp duties and practised in this respect in the Dachau and Sachsenhausen concentration camps, before he took over the commandant's duties at Auschwitz.

The accused continued to be in control of all these activities even after he left the post of the camp's commandant. He fulfilled then the functions of Himmler's special plenipotentiary for extermination of Jews and in that capacity he either sent people to Auschwitz or supervised the extermination on the spot.

For his activities in the Auschwitz camp the accused was awarded the German Military Cross, first-class with Swords, and was promoted from the rank of Hauptsturmführer to that of SS Obersturmbannführer. The same decoration was also conferred on SS Hauptscharführer Otto Mohl, who was in charge of the Auschwitz crematoria.

The Indictment enumerated and described in great detail the activities of the accused in the camp and the criminal acts committed therein. It dealt, *inter alia*, with the following subjects : the establishment of the camp and its constant enlargement, its organization, various categories of the inmates, the living conditions, accommodation and food, insufficient medical treatment, exploitation of forced labour, generally inhuman treatment, heavy arbitrary punishment and medical experiments ; and further with the methods of extermination, e.g., such as shooting, hanging, the so-called " *Sonderbehandlung* " (special treatment) and " *Sonderaktion* " (gassing and cremating), finally with the gas-chambers and crematoria, and the final " liquidation " of the camp. The Indictment also described in some detail the wholesale robbery of the inmates' possessions and valuables, the value of which amounted to many thousand millions of Reichsmarks at their rate of exchange at the time.

As already stated the people who fell victim of the Nazi extermination system carried out in the camp were Poles, Jews of various nationalities and Soviet prisoners of war. The extermination system applied against the latter was based on a special secret order of the *Amstgruppe D* dated 15th January, 1941, and issued upon directives given by the *Reichsführer S.S. und Chef der Deutchen Polizei*, Heinrich Himmler. According to these directives all Soviet prisoners were to be transferred to concentration camps for extermination, except those who were sufficiently strong to be used as forced labour in the quarries.

Apart from statements given by a large number of witnesses of Polish and other nationalities, former inmates of the camps, and other documentary evidence, the case for the Prosecution rested also on evidence submitted to the Tribunal by the following experts : Mr. Blumenthal Nahman, Director of the Central Jewish Historical Commission in Warsaw, who described the general Nazi policy and system of extermination of Jews and the organization of the concentration and death camps set up for the purpose by the German authorities in the occupied territories ; Dr. J. Olbrycht, Professor in the University of Cracow, who described the general conditions in the

Auschwitz camp and in particular as regards health, food, hygienics and the system of treatment ; Dr. R. Dawidowski, Professor of the Mining Academy in Cracow, who submitted a detailed report on the organization and work of the gas-chambers and crematoria ; Dr. E. Kowalski, Assistant-Professor at the University of Cracow, who gave evidence on the medical experiments performed by German doctors on the camp's inmates. Finally, the Tribunal took note of the reports submitted by Professor Robel, expert in toxicology and Professor Romer, expert in geography.

As part of the evidence also a documentary film was projected in the court, showing the camp buildings and establishments.

3. MEDICAL WAR CRIMES

The evidence submitted by Professor Kowalski and other witnesses showed that numerous medical experiments were performed on men and women of non-German origin, mostly Jews, at the Auschwitz concentration camp. They were carried out on orders from the supreme German authorities. The experiments fall into the following groups :

(*a*) castration experiments ;
(*b*) experiments intended to produce sterilization ;
(*c*) experiments causing premature termination of pregnancy and carried out on pregnant and child-bearing women ;
(*d*) experiments of artificial semination ;
(*e*) experiments aimed at cancer research ;
(*f*) other experiments.

(A) *Castration experiments.* They were performed on healthy, normal individuals of both sexes, and of different ages and nationalities, mostly Jews, without their voluntary consent.

X-ray treatment was applied to male and female genital organs and in particular to ovaries and testes. Before or after the X-ray application both or only one of the ovaries and testes were removed. Different dosages, usually very large, of X-rays were applied. The results were checked by the histopathological method. This aimed at establishing the fertility or sterility of the persons subjected to the experiments. Also experiments in which small or minimal doses of X-rays were applied took place. These experiments brought about a temporary loss of fertility.

These experiments were carried out by Professor Schumann instructed to this purpose by Himmler. They caused undue suffering, permanent injuries or even death of the individuals concerned. The large dosage of X-rays caused not only complete castration, but also burns and necrosis of parts of the body subjected to X-rays.

Men who were subjected to intensive X-ray treatment and had severe burns of the scrotum and thighs often died. Even if they survived, they were in constant danger of death. They were temporarily or permanently deprived of their fertility and even of their potency. Women subjected to intense X-rays were showing climacteric symptoms related to the atrophy of the ovaries. They soon showed senile changes and died. Even if they survived a temporary or permanent loss of fertility followed. Burns and

necroses, the aftermath of X-ray treatment, made the use of genitalia impossible. Castration of women was also carried out by short waves, causing coagulation of the deeper layers of the tissue, severe burns and even death.

German personnel performing experiments often observed from hiding the behaviour of castrated Jewish men and women, who were especially accommodated in common. Thus they wanted to ascertain changes which may have occurred in their libido.

(B) *Experiments intended to produce sterilization.* Sterilization of women was carried out by the pumping of a thick white test fluid, consisting of contrast medium and some unknown chemical agents, into the uterus and tubes. Also sterilizing operations were performed, the uterus, tubes and even sometimes breasts being removed. Women experienced great suffering during test fluid experiments and after them. Usually salpingitis or peritonitis followed which often proved fatal.

These experiments were performed on young and healthy Jewish women of 20–30 years of age, who had regular periods, a not too narrow cervix and who had borne at least one child. After the experiments they often lost their periods. Experiments were repeated from two to six times at intervals of from three to four weeks. In their course an X-ray control was carried on by screening and an X-ray was taken afterwards. The experiments aimed at the obliteration of the tubes This was to be achieved through the inflammation of the mucous membi ne of the uterus and of the tubes. This, in conjunction with the inflammation of the internal genital organs and often of the peritoneum, caused widespread adhesions and fibrothic changes. Men were also sterilized through suture of the vas deferense.

The total number of sterilization experiments was estimated by witnesses at about 3,000 and of the test fluid experiments at about 1,000.

Test fluid sterilization experiments were performed by Professor Clauberg or under his control. He was an eminent German gynæcologist and acted under Himmler's orders. According to one of the witnesses Professor Clauberg admitted that his experiments were of no scientific value. Identical results were previously obtained on animals and were well known to the medical profession. Thus the experiments on women in the Auschwitz camp could not serve any scientific end. In addition they were performed in terrible conditions which often led to chronic illness, permanent injury or even death. Neither the doctors nor the assistant personnel were properly trained for the purpose. Unsterilized instruments and dressings were often used.

(C) *Premature termination of pregnancy and other experiments on pregnant or child-bearing women.* Premature termination of pregnancy was carried out by the emptying of the uterus, injections of Abortus Bangserum or by laparotomy and extirpation of the uterus. Women were ill several weeks after those experiments.

Delivery was provoked by artificially causing contracture of the uterus musculature or by the use of a balloon. About 50 pregnant women were subjected to those experiments. Frequently blood of people suffering from typhus was injected before labour.

(D) *Experiments of artificial insemination.* These were also carried out without the voluntary consent of the subjects concerned. Sperm obtained from Jewish men in the camp was used. In addition to the vaginal method, sperm was directly introduced in the uterus. Such a method was dangerous and caused infection of the female genital organs as sperm obtained through artificial ejaculation cannot be aseptic.

These experiments aimed in certain cases at the checking of results of X-ray castrations, in others on the effects of test fluid injections into the uterus and tubes.

Men and women previously subjected to castration and sterilization experiments were accommodated together. Four hundred men and 250 women were thus put into the same place and results of natural insemination were observed, while in other cases artificial insemination experiments were performed. Another camp for 3,500 of such human " guinea pigs " was also built.

(E) *Experiments aimed at cancer research.* These consisted in excising parts of the uterine body, and the wound was sutured and frozen sections with the excised material made. These experiments aimed at examining early stages of cancer. They were performed not only on older and sick women, but also on young girls. Excisions were also made on completely healthy persons with no suspicion of cancer of the genital organs. Incisions were in fact amputations of the cervical part of the uterus and in each case damage of the submucous layer of the uterine body occurred.

Incisions were carried out on about 120–130 women over 30 years of age, and on many very young girls. Each day about four such experiments were performed and in this connection the uterus was illuminated and photos taken. The material obtained was sent to Dr. Wirths in Hamburg and also examined on the spot. These incisions often caused bleeding, exudative parametrytis and peritonitis. This was due to the circumstance that German doctors performing the operation did not have necessary qualifications and that the experiments were carried out in unclean conditions.

Owing to the removal of an excessive portion of the submucous membrane sexual intercourse was impossible for a certain time. Also the fibratic and scarifying changes caused the obliteration of the cervical channel and thereby relative sterility.

Experiments of transplanting cancerous bodies to the uterus and cervical channel were also carried out. After a certain time the uterus was removed and results of the transplanting observed. As in most cases these experiments were successful, however, victims usually died within one-and-a-half years, or at least temporary illness followed.

(F) *Other experiments.* Fifteen to twenty-one young girls were deprived of their virginity in a brutal manner by SS men, no noxious consequences having been known to follow. Injections of hormones to women were also made and results observed.

4. THE CASE FOR THE DEFENCE

During the preliminary investigation conducted by a *juge d'instruction* and during the trial the accused, who was defended by two counsels appointed by the Tribunal, admitted in substance all the facts preferred against him in the Indictment. In particular, he admitted that he was a member of the NSDAP and the SS, and that in his capacity as commandant of the concentration camp at Auschwitz and later as chief of D.I. Department of the Central Economic and Administrative Office of the SS he carried out and supervised the extermination of many million Jews and other people. He also admitted that in the course of this action the victims were robbed of all their possessions and valuables.

The accused denied, however, that he personally committed any acts of ill-treatment or cruelty, and questioned the accuracy of the total number of victims killed in the camp, which according to him was much lower than that of about four million submitted in the Indictment. All his questions put forward to witnesses were directed to this end in view. Neither he himself, nor his defence, introduced any evidence or witnesses on his behalf and he entirely relied on those put forward by the Prosecution. His whole defence rested solely on the submission that he was only carrying out orders received from his superiors, and he recognized his entire responsibility for everything that occurred in the camp whether he personally knew it at the time or not.

5. THE JUDGMENT OF THE TRIBUNAL

The Tribunal found the accused guilty of the alleged crimes and sentenced him to death. In addition, the Tribunal pronounced the loss of public and civic rights, and forfeiture of all property of the accused.

There are, however, some important differences between the Indictment and the Judgment, which should be noted. Apart from those which concern the findings of the Tribunal in regard to the accused's membership in the criminal organizations, and which will be described later, these differences are the following:

The Indictment charged the accused with " depriving of life ", while the Tribunal described the corresponding offences as " participation in the murder of . . . ". In the passage relating to the number of people exterminated in the Auschwitz camp, the Tribunal stated that " an undetermined number of people, at least 2,500,000, mainly Jews " were murdered.

The Indictment contained in para. (2) the charge accusing Hoess personally of " ill-treating inmates . . . physically by . . . and morally by . . . ". The wording of the corresponding section of the sentence establishes that the accused "acted to the detriment of civilians, members of the armed forces and prisoners of war by maintaining them in a state of slavery, combined with their confinement in an enclosed camp and with various physical and moral ill-treatment and tortures such as . . . "

Para. (iii) of the Indictment alleged that the accused " supervised wholesale robbery of property", etc. The Tribunal stated in its Judgment that the accused acted to the detriment of persons mentioned above also " by taking part in the wholesale robbery of . . . "

Thus it appears that the Tribunal did not express any explicit view on the question whether the accused did personally ill-treat or tortured any of the inmates, a question which was highly controversial as far as the evidence given by witnesses is concerned, and in addition brought the corresponding charges within the wording of the relevant provisions in force at the time of the trial.

B. NOTES ON THE CASE

1. THE COURT AND THE LEGAL BASIS OF THE TRIAL

The Court was the Supreme National Tribunal for trial of War Criminals, the jurisdiction and powers of which have been defined in the Decrees of 22nd January and 17th October, 1946, and in the Decree of 11th April, 1947.(1) The case was tried in Warsaw. The substantive law applied was that laid down in the Decree of 31st August, 1944, *concerning the punishment of Fascist-Hitlerite criminals guilty of murder and ill-treatment of the civilian population and of prisoners of war, and the punishment of traitors to the Polish Nation*, as promulgated in the consolidated text of this Decree on 11th December, 1946.(2)

2. THE NATURE OF THE OFFENCES

The acts committed by the accused were crimes in violation of Article 1 para. 1, and Articles 2 and 4 of the Decree mentioned above, the text of which is given in the Annex to this volume.(3) These acts were also in violation of the corresponding provisions of the Polish Civil Criminal Code of 1932 concerning murder, grievous bodily harm, torture and ill-treatment, infringement of personal liberty and appropriation of property (Articles 225, 235, 236, 246, 259 and 278). The Prosecution submitted that the crimes committed against the Soviet prisoners of war were also in violation of the Geneva Convention relative to prisoners of war.

Apart from the provisions of the above Decree already indicated, the Tribunal based its Judgment on Article 5 para. 1 of the said Decree concerning superior orders and duress, the plea of which the Tribunal rejected, and on Article 7 concerning additional penalties. The Tribunal also applied the relevant provisions of the Criminal Code dealing with the basic principles of responsibility for criminal acts.

3. CRIMINAL ORGANIZATIONS

(i) *Membership in the NSDAP*

1. The Indictment which, it is presumed, was drafted before the Polish law on membership of criminal organizations had been enacted, charged the accused Hoess with the membership of the German National Socialist Worker's Party (NSDAP) and of the SS, and described both these organizations as criminal, putting forward specified allegations against the NSDAP alone. The latter was described as an organization which was " planning,

(1) See The Annex Part II, Section 1, p. 82, of this volume.
(2) *Ibid*, Part I, pp. 82-91.
(3) *Ibid.*

organizing and perpetrating crimes against peace, war crimes and crimes against humanity " as means leading to " the subjugation of other nations ".

The logical and legal construction of the corresponding passage of the Sentence pronounced by the Tribunal is different. It is stated therein that Hoess was a member of both organizations, but the SS is mentioned first and it alone is explicitly defined as a criminal organization. The activities of both organizations are, however, closely interlinked in the Sentence, and the SS is considered a tool of the NSDAP used for committing war crimes and crimes against humanity. Crimes against peace have thus been omitted in the Sentence but the NSDAP is considered as having had criminal aims of subjugating other nations, which are described as a crime in violation of Polish municipal law (Article 4 of the Decree of 31st August, 1944, as amended by the Decree of 11th December, 1946).(1)

Thus the Tribunal has shifted the main emphasis from the NSDAP and put the emphasis on the accused's membership in the SS which alone was also mentioned in the closing speeches of the Prosecution. This was evidently done because the Tribunal could not consider the accused's membership in the NSDAP as criminal in view of the fact that Article 4, para. 3 of the Decree of 1944 lays down the rule that membership of this organization is considered criminal only as regards the leading positions, and the accused did not hold such a position in the Nazi Party.

The question of which leading positions in the NSDAP should be considered as criminal became for some time controversial in Polish legal literature and among the Polish judges. This was in consequence of a general wording of Article 4, para. 3 of the said Decree which says that membership of the NSDAP is considered criminal " as regards *all* leading positions ".(2) Thus, for instance, the question arose whether or not the position of an *Ortsgruppenkassenleiter* (Chief Cashier of the NSDAP District Organization) should be considered criminal in the meaning of the above provision. However, the view finally prevailed that only such leading ranks and positions of the NSDAP should be considered as criminal as are enumerated in the Nuremberg Judgment, i.e., the Reichsleitung of the Party, the Gauleiters, the Kreisleiters, and the Ortsgruppenleiters, as well as the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung and Kreisleitung.(3)

This view has been authoritatively upheld by a ruling of the Polish Supreme Court of 28th February, 1948. The Supreme Court gave the following reasons on which it based its decision, namely, that (*a*) the Polish legislation, by enacting the law concerning the membership of criminal organizations, wanted to bring Polish municipal law into line with the developments which have already taken place in international criminal law, in particular, in connection with the Judgment of the Nuremberg Tribunal which was pronounced prior to the Polish enactment in question ; and therefore, (*b*) while formulating the provision dealing with the criminality of membership in the NSDAP, the Polish legislator had in view only such positions in that

(1) See the Annex, Part I, Section 3, p. 86 of this volume.
(2) Italics introduced.
(3) See the *Nuremberg Judgment*, British Command Paper 6964, pp. 70-71.

organization as have been recognized as leading by the International Military Tribunal.

(ii) *Concentration Camp as a Criminal Organization*

It will be of some interest, it is thought, to devote some space in this report to another Polish case concerning the Auschwitz concentration camp, in which a number of lesser members of its personnel was tried by the same Tribunal, and to discuss the problem indicated in the above heading.

When discussing the Polish law relating to the membership of criminal organizations,[1] it has been pointed out that from the law as laid down in Article 4, paras. 2 and 3 of the Decree of 1944 (the consolidated text of 11th December, 1946), it is clear that Polish courts are not bound by the fact that certain groups or organizations have not been indicted and adjudicated by the Nuremberg Tribunal as criminal within the meaning of the London Charter. It has also been stated there that consequently in such cases the Polish court may declare such groups or organizations to be criminal within the Polish jurisdiction. Such, for instance, was the case in regard to members of the concentration camp staff at Auschwitz.

In this second Auschwitz case, in which forty officials of that camp including Artur Liebehenschel, a successor of Hoess, were tried by the Supreme National Tribunal in Cracow separately and subsequently to the Hoess trial, the Tribunal declared the authorities, the administration and members of the garrison of the Auschwitz camp to be a criminal group, irrespective of whether or not the members of these administrative or military units were at the same time members of the SS or any other organization pronounced criminal by the Nuremberg Tribunal.

In its judgment of 22nd December, 1947, the Supreme National Tribunal gave a number of reasons that served as the basis for its declaration. The most important of them can be summarized as follows :

(1) The Nuremberg Judgment does not limit the right of the Polish legislator to decide those acts which were not a subject of the findings of the Nuremberg Tribunal and can be considered as liable to punishment within the Polish jurisdiction, unless they have been explicitly declared as not criminal, as, for instance, the acts of the organization of the SA.

(2) The provisions of the Polish law now in force are not in contradiction to the Nuremberg Judgment. The interpretation of the Polish law cannot be contrary to the explicit text of this Judgment, but on the other hand there is no legal obstacle in the way of supplementing the legal principles established in this Judgment by further principles, if in substance they are not in contradiction with the former.

(3) There is no doubt that the organization of the German concentration camps is a criminal group in the meaning both of the Nuremberg Judgment and of Article 4 of the Decree of 1944, as these camps had been set up with the aim of unlawfully depriving of freedom and health, property and life of individuals and groups of people because of their race (Jews and Gipsies), nationality (Poles and Czechs), religion (Jews) or political convictions

(1) See The Annex, Part I, Section 3, pp. 86-87, of this volume.

(socialists, communists and anti-Nazis). The organization of the German concentration camps thus aimed at committing crimes against humanity, which at the same time were crimes in violation of the penal law of all civilized nations, and also war crimes as regards the acts committed against the Soviet prisoners of war.

(4) By the description " organization of a concentration camp " should be understood the authorities, the administration and the personnel of a camp, with the exception of the inmates who under compulsion were performing various administrative functions. The latter can only be responsible for their personal deeds as they were not members of the criminal organization as it is understood by the Nuremberg Judgment, namely, they were not bound together by a common aim which was the commission of crimes against humanity. Those people had no ideological ties with the organization of the concentration camps, but had been simply used as tools for the perpetration of certain crimes. This does not protect them from punishment for their personal acts, but they cannot be declared guilty of membership of a criminal organization as of a separate offence.

(5) Article 9 of the Nuremberg Charter states that the International Military Tribunal has the power to declare at the trial of any individual member of any group or organization (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization. Thus, Article 9 gave to the Tribunal the power to declare criminal *any* group or organization, the members of which committed any of the crimes enumerated in Article 6 of the Charter, i.e. crimes against peace, war crimes and crimes against humanity.

(6) The law laid down in Article 9, according to which an international Tribunal may at any time at its discretion increase the number of organizations considered as criminal, has its application in international jurisdiction. As far as the municipal jurisdiction is concerned, the municipal law has priority, and international law is to be applied only subsidiarily. International law is based not only on codifications like the Charter, but also on the judgments of courts like the Nuremberg Judgment.

(7) If therefore, the Charter and the Nuremberg Judgment are both a source of law, of which the former permits any organization to be declared a criminal one, and the latter does not prevent this, there is no legal obstacle for declaring, in accordance with Article 4, para. 2, of the Decree of 1944, as criminal the organization of the concentration camps.

(8) As the Polish legislation and judgments of Polish courts are, of course, not binding outside the Polish territory, the recognition by a Polish court of the Central Administration of the Concentration Camps as a criminal organization in general could raise objections. There is, however, no objection for declaring as criminal the organizations of the concentration camps in Poland, and foremost the organization of the concentration camp at Auschwitz.

In connection with the above declaration of the Supreme National Tribunal, and especially with its paragraphs (3) and (7), it should be pointed out that the Nuremberg Judgment did not include the organization of the concentration camps as such among the organizations declared as criminal,

primarily because the Nuremberg Indictment did not ask the Tribunal to make such a declaration in this respect.(1) Nevertheless, the Tribunal did make in its Judgment many references to the concentration camps which it described as a means for systematic commission of war crimes and crimes against humanity.(2) Moreover, the Tribunal expressly stated that " in the administration of the occupied territories the concentration camps were used to destroy all opposition groups ".(3) With specific reference to one of the ill-famed concentration camps the Tribunal, quoting the report of the War Crimes Branch of the Judge Advocate's Section of the 3rd U.S. Army, established, for instance, that :

> " Flossenburg concentration camp can be described as a factory dealing in death. Although this camp had in view the primary object of putting to work the mass slave labour, another of its primary objects was the elimination of human lives by the methods employed in handling the prisoners. Hunger and starvation rations, sadism, inadequate clothing, medical neglect, disease, beatings, hangings, freezing, forced suicides, shooting, etc., all played a major role in obtaining their object. Prisoners were murdered at random ; spite killings against Jews were common, injections of poison and shooting in the neck were everyday occurrences ; epidemics of typhus and spotted fever were permitted to run rampant as a means of eliminating prisoners ; life in this camp meant nothing. Killing became a common thing, so common that a quick death was welcomed by the unfortunate ones."(4)

One more passage may be quoted from the Nuremberg Judgment. It reads :

> " A certain number of the concentration camps were equipped with gas-chambers for the wholesale destruction of the inmates, and with furnaces for the burning of the bodies. Some of them were in fact used for the *extermination of Jews* as part of the " final solution " of the Jewish problem. Most of the non-Jewish inmates were used for labour, although the conditions under which they worked made labour and death almost synonymous terms. Those inmates who became ill and were unable to work were either destroyed in the gas-chambers or sent to special infirmaries, where they were given entirely inadequate medical treatment, worse food if possible than the working inmates, and left to die ".(5)

When dealing with the criminal aims of the SS, the Nuremberg Tribunal described in detail the activities of the RSHA (ReichsSicherheit Haupt-Ampt) and the WVHA (Wirtschafts Verwaltungs HauptAmpt). The Tribunal then stated that already since 1934 the SS through the medium of the RSHA was responsible for the central administration of concentration camps, and from 1942, when this administration was taken over under the control of the WVHA, the concentration camps were used as a source of

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(1) See the *Nuremberg Judgment*, Cmd. 6964, p. 67, para. 3.
(2) *Ibid.*, Judgments against Kaltenbrunner, p. 93 ; against Funk, p. 103 ; and general parts of the Judgment, pp. 7 and 49.
(3) *Ibid*, p. 50.
(4) *Ibid*, p. 50.
(5) *Ibid*, p. 50. Italics introduced.

slave labour, for the extermination of " anti-social elements ", experiments on human beings and extermination of Jews.(1)

In this way the Nuremberg Judgment established that the concentration camps were an important part of the machinery for the criminal activities of the SS as a whole, and of the WVHA in particular, which was one of the central offices of the SS declared by the Tribunal as a criminal organization. If, in addition, we take into account that the concentration camps were in fact the constituent executive units of the WHVA and were serving its criminal aims in general, and the realization of the plan of exterminating other nations in particular, it may well be said that the Supreme National Tribunal was on strong ground in declaring the concentration camp as a criminal group.

In making the above declaration the Supreme National Tribunal not only based itself on Article 9 of the Nuremberg Charter, but also applied *per analogiam* the statement of principle made in this connection by the Nuremberg Tribunal which stated that according to Article 9 " the Tribunal is vested with discretion as to whether it will declare any organization criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercized in accordance with well settled legal principles . . . If satisfied of the criminal guilt of *any* organization or group, this Tribunal should not hesitate to declare it to be criminal because the theory of " group criminality " is new . . . "(2)

The Supreme National Tribunal evidently considered that in regard to the concentration camps it is not sufficient, as did the Nuremberg Judgment, to have declared as criminal the three or four principal Nazi organizations, as in point of fact there were many Nazis employed in the administration of every single concentration camp, and responsible in a general sense for the mass criminality committed therein, sometimes in a higher degree than the actual perpetrators, and who were not members of any of the organizations declared as criminal by the Nuremberg Tribunal. Therefore, the Supreme National Tribunal declared the members of the authorities, of the administration and of the garrison of the German concentration camps in occupied Poland as criminal groups in the meaning of Article 4 of the Decree of 1944 (1946). It declared these members to be a criminal *group* and not *organization*, in view of the fact that the above Decree as well as the international enactments use both these descriptions, and the expression " group " is in this case more appropriate from the technical point of view, and because of the etymological character of the word " organization ".

It appears that a few words should finally be said as regards criminal knowledge on the part of the members of the concentration camps personnel. It should be recalled that the Nuremberg Tribunal declared criminal the membership of the four organizations (the Leadership Corps of the Nazi Party, the Gestapo, the SD and the SS) on the condition that the members " became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6

(1) See the *Nuremberg Judgment*, pp. 76-77.
(2) *Ibid*, pp. 66-67. Italics introduced.

of the Charter, or who were personally implicated as members of the organization in the commission of such crimes ".(1)

Although the Supreme National Tribunal did not mention in its declaration this particular question, it must be presumed that this Tribunal, having based the declaration on the analysis of the Nuremberg Charter and Judgment, took this requirement as self-evident and did not see the necessity of pointing it out. It would also seem self-explanatory that the first part of the Nuremberg Tribunal's *proviso* is hardly of much importance in the case of concentration camps, as every member of their personnel must have known that these camps were being used for the commission of acts which any ordinary sensible person must have acknowledged as criminal.

4. GENOCIDE

As it is apparent from the outline of the proceedings the trial of Hoess was another case in which the crimes perpetrated in the Auschwitz camp come within the notion of the crime of genocide. We have already described briefly the concept of this notion in connection with the case of Amon Goeth.(2) As regards the present case it may be mentioned that the Prosecution, after describing the German policy aiming at the extermination of Jews, pointed out that the mass crimes committed in concentration camps were part of the Nazi scheme of exterminating whole nations. In this connection the Prosecution recalled among others that General von dem Bach of the German Police, who was a witness in the trial against Governor Fisher, sentenced previously by the Supreme National Tribunal, had testified that during a conference held by Himmler some time before the outbreak of war, the latter explained a plan which aimed at the extermination of some thirty million of the Slav population.

The Supreme National Tribunal dealt in its Judgment only very generally with this type of the Nazi criminality. It stated that the Nazi Party had as one of its aims the biological and cultural extermination of subjugated nations, especially of the Jewish and Slav nations, in order to establish finally the German *Lebensraum* and the domination of the German race. This programme and practice of extermination of entire groups of people and of nations on specific grounds, described as the crime of genocide, the Tribunal defined as an attempt on the most organic bases of the human relationship such as the right to live and the right to existence.

One of the aspects and elements of the German system of extermination put into preliminary execution in the Auschwitz camp were the medical experiments described in some detail in the preceding part of this report.

Even if it could be assumed that the medical experiments carried out at Auschwitz concentration camp were not expected to serve any definite political aims, their criminal character is beyond any doubt. They violated all rules which must be observed when medical experiments are performed on human beings.(3) Special circumstances in which they were performed

(1) See the *Nuremberg Judgment, op cit.*, pp. 71, 75 and 79.
(2) See Case No. 37, pp. 7-9, of this volume.
(3) Compare pages 48–53, of this volume.

constitute in addition elements which allow them to be classified as violations of the laws and customs of war and of laws of humanity.

Experiments were always carried out under compulsion and in many cases physical violence was used. They were often performed by unqualified doctors and in appalling conditions. They did not serve any scientific purpose. They were performed with unnecessary suffering and injury and without proper protection against the risks of disability or death. The subjects experienced extreme pain and torture, and permanent injury or death followed in many cases. The doctors and the personnel performing experiments did not show any care or give any assistance to persons frequently seriously ill in consequence of the experiments.

Thus all these experiments violated general principles of criminal law as derived from the criminal laws of all civilized nations.

But paramount importance should be attached to the political aspect of the crime. The general scheme of the wholesale experiments points out clearly to the real aim. They were obviously devised at finding the most appropriate means with which to lower or destroy the reproductive power of the Jews, Poles, Czechs and other non-German nations which were considered by the Nazi as standing in the way of the fulfilment of German plans of world domination. Thus, they were preparatory to the carrying out of the crime of genocide.

These conclusions seem justified not only by the experiments themselves. They were corroborated by the statements of the accused Hoess himself. He confirmed the existence of plans of wholesale destruction of the Slav nations, and of Poles and Czechs in particular. It is also known that Himmler entrusted Professor Clauberg with experiments which were nothing else but the application in reverse of his successes in the domain of the treatment of sterility. Clauberg himself recognized that his experiments could contribute very little to the progress of science.

The defendant Hoess declared that the experiments of wholesale castration and sterilization were carried out in accordance with Himmler's plans and orders. These aimed at the biological destruction of the Slav nations in such a way that outside appearance of a natural extinction would have been preserved.

The X-ray experiments, particularly in cases when small or minimal dosage of rays was applied, and the setting up of a special mixed camp for about 3,500 men and women in this connection seem to be particularly characteristic. Thus a special breeding place for individuals carrying supposedly hereditary " lethal " genes, which it was hoped could be artificially cultivated among the subjugated nations, seems to have been created. This contention seems, according to Professor Kowalski who gave expert evidence in this trial, to be justified by experiments on animals. It was known from them, said this witness, that X-rays applied in a certain dosage to germinative cells caused hereditary injuries to the latter. Progeny born from such cells either could not survive or would carry congenital anomalies. Also X-ray treatment of female genital organs and in particular of the uterus caused injuries, owing to which pregnancy ended in about 42 per cent of cases in miscarriage or premature delivery.

Thus it seems probable that the X-ray experiments aimed at checking on the results obtained on animals and at providing necessary statistical data. These experiments could have determined the X-ray dosage necessary for injuring human hereditary genes. They also aimed at creating conditions in which the injured genes could be multiplied and degenerated progeny observed, so that in the end those observations could have been used for political purposes.

Still more typical were Clauberg's sterilization experiments. They all aimed at causing sterility of non-German women. In the opinion of Professor Kowalski, they were of great importance because all other well-known methods of sterilization are difficult, require much time, complicated technique and skilled doctors, and because they could be easily noticed by the persons concerned. The aim of the German doctors of sterilizing in a wholesale manner non-German women could have been achieved by the discovery of a drug which would easily and surely obliterate the relatively narrow lumen of the tubes, without injuring the mucous membrane of the uterus. Thus periods would continue, internal female genital organs would remain healthy and damage inflicted to the reproductive power of women concerned would remain unobserved. The wholesale application of such a drug, the discovery of which cannot be ruled out, would have paved a way to a demographic policy aiming at a total extinction of nations.

Thus in view of the political directives, issued by the Supreme German authorities, and the character of the experiments performed in Auschwitz on their orders, it seems obvious that they constituted the preparatory stage of one of the forms of the crime of genocide, which was intended to be perpetrated by scientific means.

CASE NO. 39

TRIAL OF ERHARD MILCH.

UNITED STATES MILITARY TRIBUNAL, NUREMBERG
(20TH DECEMBER, 1946—17TH APRIL, 1947)

Deportation and Use of Forced Labour as War Crimes and Crimes against Humanity. The Characteristics of Illegal Medical Experiments. Limits to the Responsibility of a Superior Officer for the Crimes of his Subordinates.

Erhard Milch, who during the Second World War had been Inspector-General and a Field-Marshal in the German Air Force, Aircraft Master General, Member of the Central Planning Board and Chief of the Jaegerstab, was accused of responsibility for deportations, forced labour and illegal experiments. The victims were said to be inhabitants of occupied territories, prisoners of war, German nationals and others, and the offences charged amounted to war crimes and crimes against humanity.

The Tribunal found that illegal experiments had been carried on by persons within the accused's command, but that the latter's relation to the offenders and their acts was too remote to make him responsible for their acts. On the other hand, he was found guilty of war crimes and crimes against humanity involving slave labour, deportation of civilian populations for slave labour, cruel and inhuman treatment of foreign labourers, and the use of prisoners of war in war operations by force and compulsion.

Milch was sentenced to imprisonment for life, and his application to the Supreme Court of the United States for leave to file a petition for a writ of habeas corpus was rejected.

A. OUTLINE OF THE PROCEEDINGS

1. THE INDICTMENT

The indictment filed against Milch contained three Counts, charging the commission of war crimes and crimes against humanity as defined in Control Council Law No. 10.[1]

Count One charged that between September, 1939, and May, 1945, Milch unlawfully, wilfully, and knowingly committed War Crimes as defined by Article II of Control Council Law No. 10, in that he was a principal in, accessory to, ordered, abetted, took a consenting part in, and was connected

[1] For the law relating to United States Military Tribunals, see Volume III of this series, pp. 113-120.

with plans and enterprises involving slave labour and deportation to slave labour of the civilian populations of Austria, Czechoslovakia, Italy, Hungary, and other countries and territories occupied by the German armed forces, in the course of which millions of persons were enslaved, deported, ill-treated, terrorized, tortured, and murdered.

Milch was also charged with a similar participation in " plans and enterprises involving the use of prisoners of war in war operations and work having a direct relation with war operations, including the manufacture and transportation of arms and munitions, in the course of which murders, cruelties, ill-treatment, and other inhumane acts were committed against members of the armed forces of nations then at war with the German Reich and who were in custody of the German Reich in the exercise of belligerent control ".

These acts were said to " constitute violations of international conventions, particularly of Articles 4, 5, 6, 7, 46, and 52 of the Hague Regulations, 1907, and of Articles 2, 3, 4, 6, and 31 of the Prisoner-of-War Convention (Geneva, 1929), the laws, and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and Article II of Control Council Law No. 10".

Count Two charged that " between March, 1942, and May, 1943, the defendant Milch unlawfully, wilfully, and knowingly committed War Crimes as defined in Article II of Control Council Law No. 10, in that he was a principal in, accessory to, ordered, abetted, took a consenting part in and was connected with plans and enterprises involving medical experiments without the subjects' consent, upon members of the armed forces and civilians of nations then at war with the German Reich and who were in the custody of the German Reich in the exercise of belligerent control, in the course of which experiments the defendant Milch, together with divers other persons, committed murders, brutalities, cruelties, tortures, and other inhumane acts . . .

> " The said War Crimes constitute violations of international conventions, particularly of Articles 4, 5, 6, 7 and 46 of the Hague Regulations, 1907, and of Articles 2, 3, and 4 of the Prisoner-of-War Convention (Geneva, 1929), the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and of Article II, of Control Council Law No. 10".

Count Three charged similar participation in crimes against humanity, involving the same unlawful acts as specified in Counts One and Two, but committed against " German nationals and nationals of other countries ".

These alleged crimes against humanity were said to " constitute violations of international conventions, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and Article II of Control Council Law No. 10 ".

2. THE EVIDENCE BEFORE THE TRIBUNAL

(i) *The Official Positions of the Accused*

It was shown that the defendant Erhard Milch was at various times between 1939 and 1945, Field-Marshal in the German Luftwaffe, Inspector-General of the Luftwaffe, State Secretary in the Air Ministry, General Luftzeugmeister, representative of the Wehrmacht on the Central Planning Board and Chief of the Jaegerstab.

(ii) *The Accused's Responsibility for Deportation and the Use of Slave Labour*

Of the charges regarding Slave Labour, Milch claimed that the term " Slave Labour " was a misnomer and that all foreign workmen in Germany during the war were there of their own free will ; that if they did not come voluntarily they were treated humanely and considerately and were not subjected to any ill-treatment either in transportation or while in active employment for the benefit of the Reich ; and that if ill-treatment, fatal or otherwise, of foreign workmen occurred, he was in no way responsible for such ill-treatment.

It was claimed by the prosecution that the defendant's responsibility for the crimes alleged in Count One of the Indictment arose from his activities in three capacities : as Aircraft Master General (General Luftzeugmeister) ; as a member of the Central Planning Board ; and as Chief of the Jaegerstab.

The Central Planning Board was established in 1942, and was charged with the procurement and distribution of all materials necessary for the conduct of the entire German war economy.

The Board consisted of Reich Minister Speer, Under-Secretary Koerner, and the defendant, each formally having equal authority, although in the event Speer and Milch dominated the proceedings. Meetings of the Central Planning Board were held at least weekly and the defendant presided over or was present at a majority of such meetings.

The minutes of those meetings which were offered in evidence showed a constant and unremitting concern with the problem of labour on the part of the Board. Fritz Sauckel was in supreme command of the procurement of labour for the entire war effort, and often appeared before the Central Planning Board to report on the situation as regards the supply of foreign labour. Various other officials came before the Board to express their labour needs in terms of foreign workers.

The minutes of the Central Planning Board showed also that the members of the Central Planning Board knew and discussed the fact that workers from occupied territories were being forcibly taken from their homes without knowledge of their destination, and against their will crowded into box cars without food or water or toilet facilities, deported, and forced to work in factories manufacturing armaments and other necessary items for the prosecution of the war.

The deportees, with few exceptions, were deprived of the right to move freely or to choose their place of residence ; to live in a household with their

families, to rear and educate their children ; to marry ; to visit public places of their own choosing ; to negotiate, either individually or through representatives of their own choice, upon the conditions of their own employment ; to organize into trade unions ; to exercise the free expression of opinion ; or to gather in peaceful assembly. They were frequently deprived of the right to worship according to their own conscience. They were inadequately fed, housed or cared for, and hundreds of thousands died of exhaustion and hunger. The victims included Frenchmen, Poles, Lithuanians, Ukranians, Czechs, Dutchmen, Russians and Jews.

The evidence showed that not only civilian inhabitants of occupied territories but also prisoners of war, including Russians, Poles and Frenchmen, were employed in German armament production. In a discussion with Sauckel, the defendant and others on the subject of manpower available for the armament industry, Göring stated on 28th October, 1943, that out of 2,200,000 in armament production, 770,000 were prisoners of war. On 14th April, 1943, Sauckel reported to Hitler that " 1,622,829 prisoners of war are employed in the German economy ".

The evidence demonstrated that the accused was aware of the use made of civilians from occupied territories and of prisoners of war in German industry. For instance, he testified that he knew that prisoners of war were employed in the airplane factory at Regensburg and that some twenty thousand Russian prisoners of war were used to man anti-aircraft guns protecting the various plants. He stated further that he saw certain of these prisoners manning 8.8. and 10.5 anti-aircraft guns at airplane factories in Luftgau 7 near Munich. Sauckel, the Minister Plenipotentiary for Labour, attended at least fifteen meetings of the Central Planning Board, over which the defendant presided, and discussed at length and in detail the problems involved in procuring sufficient foreign labourers for the German war effort. He disclosed the methods used in forcing civilians of the eastern countries into the Reich for war work. He related the difficulties and resistance which confronted him and the methods which he used and proposed to use in forcibly rounding up and transporting foreign workers. The advisability of using prisoners of war and inmates of concentration camps in the Luftwaffe was discussed, with the defendant offering advice and suggestions as to the most effective methods to be used.

There was evidence of many occasions on which the defendant not only listened to stories of enforced labour from eastern civilians and prisoners of war being recruited and thereby became aware of the methods used in procuring such labour, but on which he himself urged more stringent and coercive means to supplement the dwindling supply of labour in the Luftwaffe. At the 54th meeting of the Central Planning Board, held on 1st March, 1944, he expressed the opinion that force had to be exercised because there was nothing to attract the workers to Germany since they believed that Germany would soon be defeated, and because furthermore they were attached to their families and their own countries.

At the 42nd meeting of the Central Planning Board, held on 23rd June, 1943, it was recommended that the Führer be advised that 200,000 Russian prisoners of war, fit for the heaviest work, should be made available from the Wehrmacht and Waffen SS through the intermediary of the Chiefs of

the Army Groups. At a meeting on 30th October, 1942, Sauckel suggested that as soon as the Army took prisoners in operational territories they should be immediately turned over to him as plenipotentiary for labour. To this, Milch added :

> " The correct thing to do would be to have all Stalags transferred to you by order of the Führer. The Wehrmacht takes prisoners and as soon as it relinquishes them, the first delivery goes to your organization. Then everything will be in order."

At another meeting of the Central Planning Board, he said :

> " We have made a request for an order that a certain percentage of men in the Anti-Aircraft Artillery must be Russians. Fifty thousand will be taken altogether ; 30,000 are already employed as gunners. This is an amusing thing that Russians must work the guns."

Regarding this statement, the defendant made various explanations. According to one, the German word which has been translated into " amusing ", should really have been rendered " mad ". In support of this interpretation Milch argued that since he needed these prisoners in his armament programme, he could not have approved their use as gunners. He then also denied that they were in fact used as gunners, and if they were, he claimed not to have been responsible. Other witnesses clearly established that the Russian prisoners were stationed at the guns, either for servicing the pieces, hauling ammunition to them or actually firing them.

On 25th March, 1944, the defendant complained that prisoners of war were not being treated with severity if they refused to work, saying :

> " International law cannot be observed here. I have asserted myself very strongly, and with the help of Saur I have represented the point of view very strongly that the prisoners, with the exception of the English and the Americans, should be taken away from the military authorities. The soldiers are not in a position, as experience has shown, to cope with these fellows who know all the answers. I shall take very strict measures here and shall put such a prisoner of war before my court martial. If he has committed sabotage or refused to work, I will have him hanged, right in his own factory. I am convinced that that will not be without effect."

On another occasion, the defendant was shown to have approved the use of the whip on any prisoners of war who might be found guilty of shirking.

The Jaegerstab was formed on 1st March, 1944, for the purpose of increasing production of fighter aircraft. Milch and Speer were joint chiefs of this organization, which assumed control over fighter production and exploited and directed the use of foreign forced labour in the armament industry. From the minutes of its meetings it was clear that the question of manpower was repeatedly referred to by the defendant. When other methods of obtaining its labour were not available, the Jaegerstab recruited its own labour either directly or by organizing the seizing of manpower arriving on transports from the east. Much of the labour employed by the Jaegerstab in aircraft production and in the air armament industry was taken from

concentration camps and from among foreign forced labour. The Jaegerstab functioned from 1st March, 1944, to 1st August, 1944.

Forced labour from occupied countries were poorly fed, poorly clothed, and forced to work an official rate of seventy-two hours per week ; their general treatment resulted in the death of a great many and the permanent disability of others.

There was evidence that Milch was aware of the procurement and allocation of forced labour. He knew that forced labour and prisoners of war were being used in the Jaegerstab construction programme, and when the question of Italian civilian labour was being discussed at a meeting of the Jaegerstab, the defendant advocated the shooting of those who attempted to escape in transit. Again, on 25th April, 1944, he said :

> " It will only work if we put these workers into barracks. We cannot exactly treat them as prisoners. It must appear otherwise, but it must be so in practice . . . I am personally convinced after talking to the Führer that he will agree as soon as it is made reasonable. The people should not be able to mingle with the population and to conspire. Nor should they be allowed to run around free, so that they can cross the frontier every day. Both practices must be stopped . . . I am of the opinion that that must be done at once. It's all the same to me if individual people do object. Protest does not interest me at all, whether from the Chief of Prisoners of War Affairs or from our side . . . "

On other occasions, the accused stated that deportees from Italy who attempted to escape during their journey should be shot, and that: " No Frenchman will work when the invasion begins. I am of the opinion that the French should be brought over again by force, as prisoners."

As General Luftzeugmeister, the defendant had complete control of aircraft production and requisitioned labour for the aircraft industry with knowledge of the techniques used in recruiting these labourers.

The evidence presented by the Prosecution tended to show that the defendant advocated extreme measures in dealing with foreign forced labour. He had expressed the opinion that if foreign forced labourers refused to work, they should be shot. If they attempted to revolt, he had ordered that every tenth person be killed, regardless of his personal guilt or innocence.

The defendant pleaded that he was a man of very violent temper, who, when worried from overwork, was not wholly responsible for many utterances made by him. He protested further that he did not actually intend orders given in such fits of temper to be carried out, but that they were simply the result of uncontrolled anger and were understood by his associates and subordinates to have been so. He also declared that head injuries resulting from two serious accidents were largely responsible for such uncontrollable fits of temper.

(iii) *The evidence Regarding the Carrying Out of Illegal Experiments*

The evidence showed that at various times between March, 1942, and April, 1943, there were conducted at Dachau concentration camp experiments referred to as " low-pressure ", " cold water " and " freezing " experiments.

The apparatus used for the " low-pressure tests " was simply a wood and metal cabinet in which air pressure could be increased and decreased, the purpose of the tests being to ascertain the subject's capacity to inhale large amounts of pure oxygen, and to observe his reaction to a gradual decrease of oxygen. In this manner high-altitude atmospheric pressure was to be simulated, and from the results the experimenters were to be able to determine methods and means of maintaining and saving lives among aviators compelled to rise to extreme altitudes, or, because of war hazards, obliged to parachute to earth.

The process followed in the " cold water experiments " was to place the subject outdoors at night in a nude state, and then to pour cold water over him hourly.

The " freezing experiment " was conducted in the following manner. A large basin was filled with water and ice was added until the temperature measured 3 degrees. Then the subject, either naked or dressed in a flying suit, was forced into the freezing liquid. One witness described the experimental basin as being made of wood, two metres long, two metres high, and 50 centimetres above the floor. He stated that 280 to 300 prisoners were used in the tests, many of them undergoing as many as three experiments, and that out of the number indicated 80 to 90 died. The selection of the subjects was left to the political department of the camp after a Dr. Rascher(1) had made requests for a certain number. The eventual victims were made up of political prisoners, foreigners, prisoners of war and inmates condemned to death. The witness claimed that none of the subjects were volunteers.

It was claimed by Milch that only legitimate scientific experiments were conducted, which did not involve pain and could not ordinarily be expected to result in death. The evidence showed, however, that at least the experiments conducted by Dr. Rascher involved suffering in the extreme and often resulted in death. Under the specific guidance of Dr. Rascher, the air pressure was reduced to 14,000 metres, a point at which no airman would ever be expected to fly. When Dr. Rascher was handling the " freezing experiments " a large number of persons involved were kept in the water so long that they died. Many others died during the reviving or during the rewarming procedure.

It was also claimed by Milch that the only persons who were used in these experiments were habitual criminals who had been sentenced to death and who were given the opportunity of offering themselves for use in the experiments and receiving as a reward, if they survived, a commutation of the death sentence to life imprisonment. The evidence revealed, however, only one possible case of such a subject receiving a pardon, and that a doubtful instance.

An Austrian patent lawyer, he had been an inmate of Dachau, declared under oath that Dr. Rascher chose the victims for his researches from the punishment company at Dachau, a group made up of political prisoners marked for extermination. The witness added: " A few convicts were among the political prisoners, having been placed there merely to depress

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(1) See p. 34.

the morale of the political prisoners, and so a few convicts were killed along with the others."

Another witness, who had been a nurse in the ward where the experiments were carried out, testified that from 180 to 200 concentration camp inmates were subject to the high-altitude experiments, and of these, 10 were volunteers. Of all these subjects only one man was ever released. It was this witness's conclusion that over a period of three months from 70 to 80 persons were killed in the high-altitude experiments. He declared further that approximately 40 of the persons killed were not previously condemned to death.

During the periods covered by the experiments the defendant was Under-Secretary of State and Head of the Reich Air Ministry, Inspector-General and Second-in-Command under Göring of the Luftwaffe. In these various capacities, certain purely military duties devolved upon him, especially as Inspector-General, and the major part of his duties revolved around the production of aircraft for the Luftwaffe. As Inspector-General he was, however, in charge of the office which authorized research conducted on behalf of the Air Force, and one of his immediate subordinates was Professor Hippke, who held the post of Inspector of the Medical Services of the Luftwaffe. Hippke was a physician, and had supervision over all matters involving the health and physical welfare of the personnel of the Luftwaffe.

The experiments at Dachau were conducted by three physicians, Dr. Romberg, Dr. Ruff and Dr. Rascher. There was some evidence of Hippke's having ordered them to be conducted, but not of his informing Milch of his action. It was apparent from the evidence that Dr. Rascher, who was attached to the Luftwaffe, was principally responsible for the nature of the experiments. Dr. Ruff and Dr. Romberg were also attached to the Luftwaffe and were, therefore, remotely under the command and control of the defendant. It was clear that the actual activities of these three physicians were removed from the immediate scrutiny of the defendant even though their activities were conducted within the orbit of the Luftwaffe, over which the defendant had command.

There was no evidence that the defendant personally participated in or instituted the experiments, or that they were conducted under his direction. Neither was there any proof of knowledge on the accused's part that unwilling subjects would be forced to submit to experiments or that they would be painful and dangerous to human life. The defendant concerned himself very little with the details of the experiments. It was shown that a motion picture explaining the experiments was brought to Berlin and exhibited in the Air Ministry Building, where the defendant had his office, but there was no clear evidence that he was present when it was shown and the showing was held long after the experiments were concluded.

On 20th May, 1942, the defendant wrote to Wolff, Himmler's Adjutant, stating that:

> " . . . our medical inspector (Dr. Hippke) reports to me that the altitude experiments carried out by the SS and Luftwaffe at Dachau have been finished. Any continuation of these experiments seems essentially unreasonable . . .

" The low-pressure chamber would not be needed for these low-temperature experiments. It is urgently needed at another place and therefore can no longer remain in Dachau."

The same letter of 20th May, 1942, to Wolff, indicated that the defendant was aware of the proposed " freezing experiments ". He admitted giving orders for the conduct of certain experiments aiming at lessening " perils at high seas," but he contended that he did not know of, or contemplate, that the experiments would be conducted in an illegal manner or would result in the injury or death of any person. The defendant further asserted that he did not know or have any reason to believe that the experiments were conducted in such a manner as they were until after they had been completed.

Dr. Rascher wrote many reports on the results of these experiments, but there was no proof that they ever reached the defendant. On the contrary, they were addressed to Himmler and to Rudolf Brandt, his Adjutant.

3. JUDGMENT OF THE TRIBUNAL

(i) *Illegal Experiments*

The Tribunal chose to deal first with Count Two of the Indictment,[1] and on this Count the judgment ran as follows :

" In approaching a judicial solution of the questions involved in this phase of the case, it may be well to set down seriatim the controlling legal questions to be answered by an analysis of the proof:

(1) Were low-pressure and freezing experiments carried on at Dachau?

(2) Were they of a character to inflict torture and death on the subjects ?

(The answer to these two questions may be said to involve the establishment of the *corpus delicti.*)

(3) Did the defendant personally participate in them ?

(4) Were they conducted under his direction or command ?

(5) Were they conducted with prior knowledge on his part that they might be excessive or inhuman ?

(6) Did he have the power or opportunity to prevent or stop them ?

(7) If so, did he fail to act, thereby becoming *particeps criminis* and accessory to them ? "

On these questions, and in view of the evidence before it, the Tribunal found as follows :

" (1) As to the first question, the evidence is overwhelming and not contradicted that experiments involving the effect of low air pressure and freezing on live human beings were conducted at Dachau from March through June, 1942.

" (2) Approaching the second question, it is claimed by the defendant that only legitimate scientific experiments were conducted which did not involve pain or torture and could not ordinarily be expected to result in death. It is remotely possible that so long as the experiments were

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[1] See p. 28.

under the guidance of Dr. Ruff and Dr. Romberg some consideration was given to the possible effect upon the subjects of the experiments. But it is indisputable that the experiments conducted by Dr. Rascher involved torture and suffering in the extreme and in many cases resulted in death. Under the specific guidance of Dr. Rascher, the air pressure was reduced to a point which no flier would ever be required to undergo (14,000 metres). The photographs of the subjects undergoing these experiments indicate extreme agony and leave no doubt that any victim who was fortunate enough to survive had undergone a harrowing experience. The Tribunal does not hesitate to find that these experiments, performed under the specious guise of science, were barbarous and inhuman. It has been urged by the defendant that the only persons used as subjects of these experiments were habitual criminals who had been sentenced to death and who were given the option of offering themselves for the experiments and receiving as a reward, if they survived, a commutation of the death sentence to life imprisonment. This claim scarcely merits serious consideration. A number of witnesses stated that they had a vague understanding that this was the case, but the record is entirely barren of any credible testimony which could possibly justify such a finding of fact.(1)

" (3) The Prosecution does not claim (and there is no evidence) that the defendant personally participated in the conduct of these experiments.

" (4) There is no evidence that the defendant instituted the experiments or that they were conducted or continued under his specific direction or command. It may perhaps be claimed that the low-pressure chamber, which was the property of the Luftwaffe, was sent to Dachau at the direction of the defendant, but even if this were true it could not be inferred from the fact alone that he thereby promulgated the inhuman and criminal experiments which followed. The low-pressure chamber was susceptible of legitimate use and, perhaps, had Dr. Rascher not injected himself into the proceedings, it would have been confined to that use.

" (5) Assuming that the defendant was aware that experiments of some character were to be launched, it cannot be said that the evidence shows any knowledge on his part that unwilling subjects would be forced to submit that the experiments would be painful and dangerous to human life. It is quite apparent from an overall survey of the proof that the defendant concerned himself very little with the details of these experiments. It was quite natural that this should be so. His most pressing problems involved the procurement of labour and materials for the manufacture of airplanes. His position involved vast responsibilities covering a wide industrial field, and there were certainly count-

(1) In his concurring opinion, Judge Musmanno stressed that :

" Though Milch is acquitted of complicity and participation in the medical experiments, we have nonetheless commented on those experiments at length. We have done this because otherwise the reference to Milch's acquittal standing alone might convey the impression that the experiments themselves were not criminal. The Tribunal holds that the *corpus delicti* was established and a crime was committed, even though Milch is not guilty of it."

less surbordinate fields within the Luftwaffe of which he had only cursory knowledge. The Tribunal is convinced that these experiments, which fell naturally and almost exclusively within one of his subordinate departments, engaged the attention of the defendant only perfunctorily, at all.

" (6) Did the defendant have the power or opportunity to prevent or stop the experiments ? It cannot be gainsaid that he had the authority to either prevent or stop them in so far as they were being conducted under the auspices of the Luftwaffe. It seems extremely probable, however, that, in spite of him, they would have continued under Himmler and the SS. But certainly he had no opportunity to prevent or stop them, unless it can be found that he had guilty knowledge of them, a fact which has already been determined in the negative. As early as 20th May, 1942, the defendant wrote to Wolff, Himmler's Adjutant, stating :

' . . . our medical inspector (Dr. Hippke) reports to me that the altitude experiments carried out by the SS and Luftwaffe at Dachau have been finished. Any continuation of these experiments seems essentially unreasonable . . .

' The low-pressure chamber would not be needed for these low-temperature experiments. It is urgently needed at another place and therefore can no longer remain in Dachau.' "

Certainly the defendant did not have the opportunity to prevent or stop the experiments if he had been told and was convinced that they had terminated on 20th May, 1942, and there is no reason to believe that he did not rely upon Dr. Hippke's report as to their termination. Considerable emphasis is laid upon the testimony that a motion picture of the experiments was brought to Berlin and exhibited in the Air Ministry Building, where the defendant had his office. It may even be said that the picture was brought to Berlin for the defendant's edification. But it appears that he was not present when it was shown and that, in any event, the showing was long after the experiments were concluded, at which time the defendant certainly could do nothing toward preventing them or stopping them.

" (7) In view of the above findings, it is obvious that the defendant never became *particeps criminis* and accessory in the low-pressure experiments set forth in the Second Count of the indictment.

As to the other experiments, involving subjecting human beings to extreme low temperatures both in the open air and in water, the responsibility of the defendant is even less apparent than in the case of the low-pressure experiments . . . "

The Tribunal therefore found the accused not guilty under Count Two of the Indictment.

(ii) *Slave Labour*

Following a summary of the evidence relating to Count One,[1] the Tribunal made the following remarks :

[1] See pp. 27–8.

" The defence on this Count is ingenious but unconvincing. As to the use of prisoners of war, the defendant testified that he had been advised by some unidentified person high in the National Socialist Councils that it was not unlawful to employ prisoners of war in war industries. The defendant was an old and experienced soldier, and his testimony revealed that he was well acquainted with the provisions of the Geneva and Hague Treaties on this subject, which are plain and unequivocal. In the face of this knowledge, the advice which he claims to have received should have raised grave suspicions in his mind. Presenting an entirely different aspect of his defence, he testifies that many of the Russian prisoners of war volunteered to serve in the war industries and apparently enjoyed the opportunity of manufacturing munitions to be used against their fellow countrymen and their allies. Other Russian prisoners of war, he states, were discharged as such and immediately enrolled as civilian workers. The photographs introduced in evidence, however, show that they still retained their Russian army uniforms, which makes their status as civilians suspect. Be that as it may, it does not adequately answer the charge that hundreds of thousands of Polish prisoners of war were cast into concentration camps and parcelled out to various war factories, nor the further fact that thousands of French prisoners of war were compelled to labour under the most harrowing conditions for the Luftwaffe.

" As to the French civilian workers who were employed at war work in Germany after the conquest of France, it is the contention of the defendant that these workers were supplied by the French Government under a solemn agreement with the Reich. It is claimed with a straight face that the Vichy Government, headed by Laval, entered into an international compact with the German Government to supply French labourers for work in Germany. This contention entirely overlooks the fact that the Vichy Government was a mere puppet set up under German domination, which, in full collaboration with Germany, took its orders from Berlin. The position of the defendant seems to be that, if any force or coercion was used on French citizens, it was exerted by their own government, but this position entirely overlooks the fact that the transports which brought Frenchmen to Germany were manned by German armed guards and that upon their arrival they were kept under military guard provided by the Wehrmacht or the SS.

" It was sought to disguise the harsh realities of the German Foreign labour policy by the use of specious legal and economic terms, and to make such policy appear as the exercise of conventional labour relations and labour law. The fiction of a ' labour contract ' was frequently resorted to, especially in the operations of the Todt Organization, which implied that foreign workers were given a free choice to work or not to work for German military industry. This, of course, was purely fictitious, as is shown by the fact that thousands of these ' contract workers ' jumped from the trains transporting them to Germany and fled into the woods. Does anyone believe that the vast hordes of Slavic Jews who laboured in Germany's war industries were accorded the rights of contracting parties ? They were slaves, nothing less—kidnapped, regimented, herded under armed guards, and worked until

they died from disease, hunger and exhaustion. The idea of any Jew being a party to a contract with Germans was unthinkable to the National Socialists. Jews were considered as outcasts and were completely at the mercy of their oppressors. Exploitation was merely a convenient and profitable means of extermination, to the end that, ' when this war ends, there will be no more Jews in Europe ' . . .

" The German nation, before the ascendancy of the NSDAP, had repeatedly recognized the rights of civilians in occupied countries. At the Hague Peace Conference of 1907, an amendment was submitted by the German delegate, Major-General von Gundell, which read :

> ' A belligerent is likewise forbidden to compel the nationals of the adverse party to take part in the operations of war directed against their country, even when they have been in his service before the commencement of the war.'

The German Manual for war on land (*Kriegsbrauch im Landrecht*, ed. 1902) stated :

> ' The inhabitants of an invaded territory are persons endowed with rights . . . subject to certain restrictions . . . but who otherwise may live free from vexations and, as in time of peace, under the protection of the laws.' "

During the First World War, an order of the German Supreme Command (3rd October, 1916) provided for the deportation of Belgian vagrants and idlers to Germany for work, but specified that such labour was not to be used in connection with operations of war. The order resulted in such a storm of protest that it was at once abandoned by the German authorities.

" It cannot be contended, of course, that foreign workers were entitled to comforts or luxuries which were not accorded German workers. It is also recognized that, especially during the latter part of the war, there was a universal shortage of food and fuel throughout the Reich and in the discomforts arising therefrom foreign workers were bound to share. But it is an undoubted fact that the foreign workers were subjected to cruelties and torture and the deprivation of decent human rights merely because they were aliens. This was not true in isolated instances, but was universal and was the working out of the German attitude toward those whom it considered inferior it was merely to maintain their productivity and did not stem from any humanitarian considerations.

" The Tribunal therefore finds the defendant guilty of the war crimes charged in Count One of the Indictment, to wit, that he was a principal in, accessory to, ordered, abetted, took a consenting part in and was connected with, plans and enterprises involving slave labour and deportation to slave labour of the civilian populations of countries and territories occupied by the German armed forces, and in the enslavement, deportation, ill-treatment and terrorization of such persons ; and further that the defendant was a principal in, accessory to, ordered, abetted, took a consenting part in, and was connected with plans and enterprises involving the use of prisoners

of war in war operations and work having a direct relation to war operations."

(iii) *The Charge of Crimes Against Humanity*

Regarding Count Three,[1] the Tribunal, in addition to summarizing the relevant evidence, declared as follows :

" Count Three of the Indictment charges the defendant with crimes against humanity committed against ' German nationals and nationals of other countries.' Sufficient proof was not adduced as to such offences against German nationals to justify an adjudication of guilt on that ground. As to such crimes against nationals of other countries, the evidence shows that a large number of Hungarian Jews and other nationals of Hungary and Rumania, which countries were occupied by Germany but were not belligerents, were subjected to the same tortures and deportations as were the nationals of Poland and Russia. In Count One of the Indictment these acts are charged as war crimes and have heretofore been considered by the Tribunal under that Count in this judgment. In the judgment of the International Military Tribunal (Vol. I, *Trial of the Major War Criminals*, page 254), the court stated :

" ' From the beginning of the war in 1939, war crimes were committed on a vast scale which were also crimes against humanity.' "

This is a finding of law and an interpretation of Control Council Law No. 10, with which this Tribunal is in full accord.

" Our conclusion is that the same unlawful acts of violence which constituted war crimes under Count One of the Indictment also constitute crimes against humanity as alleged in Count Three of the Indictment. Having determined the defendant to be guilty of war crimes under Count One, it follows, of necessity, that he is also guilty of the separate offence of crimes against humanity, as alleged in Count Three, and this Tribunal so determines."

(iv) *Superior Orders*

The Tribunal then expressed the following conclusions regarding what amounted to a plea of superior orders :

" In exculpation, the defendant states that he was a German soldier and that whatever was done by him or with his knowledge or consent was done in pursuance of a national military policy, promulgated by Hitler and in obedience to military orders. He protests that, no matter how violently he disagreed with the methods used by the German Reich in the furthering of its policy of aggressive war, he was helpless to extricate himself and had no alternative except to stay with the venture to the bitter end. It is true that withdrawal may involve risks and dangers, but these are incidental to the original affiliation with the unlawful scheme. He who elects to participate in a venture which may result in failure must make his election to abandon the enterprise if it is not to his liking or to stay as a participant, and win or lost according to the outcome.

" Much significance must be attached to the meeting of 23rd May, 1939, at which the defendant was admittedly present and in which

(1) See p. 28.

Hitler spoke at great length as to his plans for the subjugation of friendly minor nations and the ultimate conquest of Europe. A purported record of the events at this meeting has been introduced in evidence and has been found to be reliable and accurate by the International Military Tribunal. The defendant has throughout insisted that this record, is spurious and was made by Schmundt long after the occasion which it records. Of course, it was never anticipated that this record which was marked ' Top Secret, To be Transmitted by Officer Only,' would ever be captured and its contents become known. It is not surprising that those who sat and listened to the astounding programme of the Führer now wish that they had been absent. It cannot be denied that there was a meeting of some kind which the defendant attended and at which the Führer spoke, and further that it was held a few short months before the actual invasion of Poland, as forecast in the report of the meeting. The Schmundt paper does not pretend to be a verbatim report of Hitler's exact words, but certainly all of the diabolical plans which it reveals were not manufactured by Schmundt out of thin air, attributed to Hitler, and then marked ' Top Secret '. Even if Hitler said only a small part of what is attributed to him Schmundt, there was enough said to advise and warn a man of the defendant's intelligence and experience that mischief was afoot. Every sentence shrieks of war. The record hints at nothing else, and, if all references to conquest and war and world domination are eliminated, Hitler did not speak at all. At this early date, the defendant must be charged with knowledge that a war of aggression, to be ruthlessly pursued, was planned. This, then, was the time for him to have made his decision—the decision which confronts every man daily—to be honourable or dishonourable. Life consists quite generally in making such decisions. As an old soldier, schooled in the code of war and well aware of the principles to which an honourable soldier must adhere, he sat complacently and listened to a proposed programme which violated national honour, personal integrity and the moral code of an honest soldier. He made his choice and elected to ride with the tyrant.

" When the defendant joined the National Socialist Party in 1933, Germany was in the throes of dire economical and political distress and was burdened by a myriad of political parties, each with its separate programme and all functioning at cross-purposes. The defendant elected to affiliate with the NSDAP because, he testified, he believed it offered the most likely agency for bringing order out of chaos. But very soon he must have realized that he had joined a band of villans whose programme contemplated every crime in the calendar. The Nazi code was not a secret. It was published and proclaimed by the party leaders in long harangues to the people ; decrees and directives were broadcast ; the infamous Streicher was spreading anti-Jewish obscenities throughout the Reich in *Der Stuermer ;* Roehm and a large number of the SA were murdered by Hitler's orders ; hundreds of German citizens were cast into concentration camps for ' political re-education ', without hearing or opportunity for defence ; the iniquitous Gestapo stormed through the land, with power over life and liberty which could not be questioned ; in public view Jews were beaten

and killed, their synagogues burned and their stores destroyed. The Party proclaimed its objectives from the house-tops and verified them by open public conduct throughout the Reich. The significant fact which must not be overlooked is that all these things happened *before* the war was launched, at a time when there was no claim upon the loyalty of the defendant as a soldier to protect his homeland at war. He protests that he never subscribed to the Master Race philosophy, but 13 years before he joined the Party in 1933, its precepts and demands had been proclaimed, among which was Point 4 :

> ' Only a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently no Jew can be a member of the race.' "

The humblest citizens of Germany knew that the iniquitous doctrines of the Party were being implemented by ruthless acts of persecution and terrorism which occurred in public view. Thousands of obscure German citizens were only too well aware that they were living under the scrutiny of an army of spies and saw their friends and relatives summarily dispatched to concentration camps for the slightest suspicion of dissidence. The defendant did not live in a vacuum. He was not blind or deaf. Long before 1939 ; long before his military loyalty was called into play ; long before the door to withdrawal was closed, he could have seen the bloody handwriting on the wall, for murder and enslavement of his own countrymen was there written in blazing symbols. But he had taken on the crimson mantle of the Party, with all its ghastly implications, and he wore it with glory and profit to himself to the end. Others with more courage and higher principles and with more loyalty to the ancient German ideals rebelled and withdrew from the brutal crew : Von Clausewitz, Yorck von Wartemberg, Schlegelberger, Schmitt, Elts von Ruebenach, Tesmer. These men in high positions had the character to repudiate great evil, and if in so doing they took risks and made sacrifices, nevertheless they made their choice to stand with decency and justice and honour. The defendant had his opportunity to join those who refused to do the evil bidding of an evil master, but he cast it aside, and his professed repentence now comes too late . . .

" In an authoritarian state, the head becomes the supreme authority for woe as well as weal. Those who subscribe to such a state submit to that principle. If they abjectly place all the power in the hands of one man, with no right reserved to check or limit or repudiate, they must accept the bitter with the sweet. This is especially true of those in high places in the state—those who choose to enjoy the honour, the emoluments and the power to such high stations. By accepting such attractive and lucrative posts under a head whose power they knew to be unlimited, they ratify in advance his every act, good or bad. They cannot say at the beginning, ' The Führer's decisions are final ; we will have no voice in them ; it is not for us to reason why ; his will is law ', and then, when the Führer decrees aggressive war or barbarous inhumanities or broken covenants, to attempt to exculpate themselves by saying, ' Oh, we were never in favour of *those* things ' . . . "

4. CONCURRING OPINION BY JUDGE MUSMANNO

(i) *Slave Labour*

In the course of a concurring judgment, Judge Musmanno ruled that the Nazi Programme for the forcible recruiting of millions of foreign workers for employment in German industry was in direct violation of Article 52 of the Hague Convention, which provides that :

> " Requisitions in kind and services shall not be demanded from local authorities or inhabitants except for needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country . . . "

The use of prisoners of war for the same purpose was a breach of Article 31 of the Geneva Prisoners of War Convention and Article 6 of the Hague Convention which run as follows :

> " Article 31. Work done by prisoners of war shall have no direct connection with the operations of the war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units . . . "
>
> " Article 6. The State may employ the labour of prisoners of war, other than officers, according to their rank and capacity. The work shall not be excessive, and shall have no connection with the operations of the war . . . "

At another point in his judgment Judge Musmanno dealt with the illegality of the German use of Russian prisoners of war on anti-aircraft guns, as follows :

> " It is clear that the Russian prisoners were utilized at the guns and that this type of use of prisoners of war represents an extreme violation of the laws and customs of war.
>
> " It has been argued by the defence that since Russia had denounced adherence to the Geneva Convention, Germany was not compelled to treat Russian prisoners with the limitations laid down in that convention. German Admiral Canaris on 15th September, 1941, in a memorandum of counsel to the German High Command, declared that despite Russia's attitude on the Geneva Convention her prisoners were yet entitled to immunities guaranteed under the rules and customs of war :
>
> ' The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the USSR. Therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th Century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people . . . The decrees

for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint.' (I.M.T. 222.)

" Admiral Canaris's position was entirely correct and in accordance with accepted international law. In the episode of the Russian gunners adverted to by Milch, he could not help but know the physical facts and could not escape being aware that such use of prisoners of war violated international law. His responsibility here is unequivocal."

The judgment later quoted Article 9 of the Geneva Convention, which provides that :

" . . . No prisoner may at any time be sent to an area where he would be exposed to the fire of the fighting zone, or be employed to render by his presence certain points or areas immune from bombardment."

The learned Judge pointed out that, according to the Defence, while it was recognized that Article 52 of the Hague Regulations represented the law and that deportation for forced labour was illegal yet " total warfare, as it raged in World War II, suspended, if it did not outrightly abrogate, all these rules heretofore respected and esteemed as binding on civilized nations. In this respect Defence Counsel argues that ' modern warfare, having as its aim total annihilation of the armed production of the enemy, brought with it to a great extent warfare against the civilian population ', and he cites total blockade as an illustration of his thesis." The Judgment ruled, however, that " it does not follow that because military necessity unintentionally victimizes a civilian population, political domination may strip them of their civil rights and subject them to intentional torture and possible death. With all its horror modern war still ' is not a condition of anarchy and lawlessness between the belligerents, but a contention in many respects regulated, restricted and modified by law.' (Oppenheim, *ibid*, 421)."

" Though the adversaries descend into the pit of bloody combat, there is always open to them the means or reascending to the level of non-hostile negotiations. The matter of temporary truces for recovering the dead and succouring the wounded, the making of arrangements through international relief organizations for the treatment of prisoners, the granting of safe passage through the lines of persons mutually agreed upon by the parties, all are instances which refute the logical development of Defence Counsel's argument that total warfare justifies the abandonment of every restriction and authorizes the combatants to use all manners and means to win the conflict."

Of the claim by the defendant that he did not intend his more violent words to be taken seriously, the judgment said : " But underlings who heard these wild, inflammatory utterances did not know that Milch was only barking if in fact we are to assume that his ferocious words were only purposeless growlings ", and, later, " violent language is not as innocuous as Milch would have the present world believe. Even if it should be true that his immediate circle laughed at his fulminations, as was testified, there is no assurance that others laughed ".

(ii) *Medical Experiments*

Regarding the legality of medical experiments, Judge Musmanno ruled that:

" Whether the project was criminal and inhumane depends upon answers to the inevitable questions:

1. Were the prisoners actually condemned to death previously ?
2. If so, for what reasons were they condemned to capital punishment ?
3. Were the experiments painful to the subjects ?
4. What scientific benefits resulted from the experiments ? "

In Judge Musmanno's opinion " the subjects were to die anyway ", but of the second point he said: " If any prisoner used in the experiments was condemned to death merely for opposing the Nazi Régime without actually having committed any physical crime, it does not answer the criminal charge to say that the subject was already doomed to die. . . . Exculpation from the charge of criminal homicide can only possibly be based upon bona fide proof that the subject had committed murder or any other legally recognized capital offence; and, not even then, unless the sentencing Tribunal with authority granted by the State in the constitution of the court, declared that the execution would be accomplished by means of a low-pressure chamber ". The judgment points out that many of the victims were in fact " political prisoners marked for extermination ".

Judge Musmanno quoted evidence of the extreme pain caused to the victims of the experiments, and made it clear that in his opinion the experiments were of no value whatever.

5. CONCURRING OPINION BY JUDGE PHILLIPS

Judge Phillips summarized the evidence against the accused on all Counts, but, in his remarks on legal matters, concentrated his attention on Counts One and Three, which involved charges of deportation and slave labour. He pointed out that: " International Law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime ".

These conditions he enunciated as follows: " If the transfer is carried out without a legal title, as in the case where people are deported from a country occupied by an invader while the occupied enemy still has an army in the field and is still resisting, the deportation is contrary to international law. The rationale of this rule lies in the supposition that the occupying power has temporarily prevented the rightful sovereign from exercising its power over its citizens. Articles 43, 46, 49, 52, 55 and 56, Hague regulations which limit the rights of the belligerent occupant, do not expressly specify as crime the deportation of civilians from an occupied territory. Article 52 states the following provisions and conditions under which services may be demanded from the inhabitants of occupied countries.

1. They must be for the needs of the army of occupation.
2. They must be in proportion to the resources of the country.
3. They must be of such a nature as not to involve the inhabitants in

the obligation to take part in military operations against their own country.

" In so far as this section limits the conscription of labour to that required for the needs of the army of occupation, it is manifestly clear that the use of labour from occupied territories outside of the area of occupation is forbidden by the Hague Regulation.

" The second condition under which deportation becomes a crime occurs when the purpose of the displacement is illegal, such as deportation for the purpose of compelling the deportees to manufacture weapons for use against their homeland or to be assimilated in the working economy of the occupying country. The defence as contained in this case is that persons were deported from France into Germany legally and for a lawful purpose by contending that such deportations were authorized by agreements and contracts between Nazi and Vichy French authorities. The Tribunal holds that this defence is both technically and substantially deficient. The Tribunal takes judicial notice of the fact that after the capitulation of France and the subsequent occupation of French territory by the German army that a puppet government was established in France and located at Vichy. This government was established at the instance of the German army and was controlled by its officials according to the dictates and demands of the occupying army and that in a contract made by the German Reich with such a government as was established in France amounted to in truth and in fact a contract that on its face was null and void. The Vichy Government, until the Allies regained control of the French Republic, amounted to no more than a tool of the German Reich. It will be borne in mind that at no time during the Vichy régime a Peace Treaty had been signed between the French Republic and the German Reich but merely a cessation of hostilities and an armistice prevailed, and that French resistance had at no time ceased and that France at all times still had an army in the field resisting the German Reich.

" The third and final condition under which deportation becomes illegal occurs whenever generally recognized standards of decency and humanity are disregarded. This flows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner. A close study of the pertinent parts of Control Council Law No. 10 strengthens the conclusions of the foregoing statements that deportation of the population is criminal whenever there is no title in the deporting authority or whenever the purpose of the displacement is illegal or whenever the deportation is characterized by inhumane or illegal methods."

The judgment then continued :

" Article II (1) (*c*) of Control Council Law No. 10 specifies certain crimes against humanity. Among those is listed the deportation of any civilian population. The general language of this subsection as applied to deportation indicates that Control Council Law No. 10 has unconditionally contended as a crime against humanity every instance of the deportation of civilians. Article II (1) (*b*) names deportation to

slave labour as a war crime. Article II (1) (*c*) states that the enslavement of any civilian population is a crime against humanity. Thus Law No. 10 treats as separate crimes and different types of crime " deportation to slave labour " and " enslavement ". The Tribunal holds that the deportation, the transportation, the retention, the unlawful use and the inhumane treatment of civilian populations by an occupying Power are crimes against humanity.

" The Hague and Geneva Conventions codify the precepts of the law and usages of all civilized nations. Article 31 of the Geneva Convention provides that labour furnished by prisoners of war shall have no direct relation to war operations. Thus the Convention forbids: 1, the use of prisoners of war in manufacture or transportation of arms or ammunitions of any kind ; and 2, the use for transporting of material intended for combat units. The Hague Regulations contain comparable provisions. The essence of the crime is the misuse of prisoners of war which derives from the kind of work to which they are assigned, in other words, to work directly connected with the war effort. The Tribunal holds as a matter of law that it is illegal to use prisoners of war in armament factories and factories engaged in the manufacture of airplanes for use in the war effort."

Of the Defence claim that the accused made violent statements, due to uncontrollable temper, overwork and head injuries, which were not to be taken seriously, Judge Phillips expressed his opinion as follows :

" I have given due consideration to the explanation given by the defendant and am compelled to reject it. If but only a few of such remarks could be attributed to the defendant, his protestations might be given some credence ; but when statements such as appear in the documents have been persistently made over a long period of time, at many places and under such varying conditions, the only logical conclusion that can be reached is that they reflect the true and considered attitude of the defendant toward the Nazi foreign labour policy and its victims and are not mere aberrations brought on by fits of uncontrollable anger. I find as a fact, therefore, that the true attitude of the defendant toward foreign labourers and prisoners of war is that reflected in the documents of the Prosecution, and was not the result of uncontrollable fits of temper. I find, further, that the defendant ordered, advised, counselled and procured inhumane and illegal treatment of foreign workers resulting in permanent injury and death to many ".

6. SENTENCE

Having been thus found guilty under Counts One and Three, but not guilty under Count Two, Milch was sentenced to imprisonment for life.

The sentence passed was confirmed by the Military Governor.

7. PETITION TO THE SUPREME COURT OF THE UNITED STATES

On 17th May, 1947, Milch's Counsel submitted an application, signed by both, to the Military Governor, to be forwarded to the Supreme Court of the United States. In his application Milch requested the Supreme

Court to quash the sentence as illegal under Articles 60, 63 and 64 of the Geneva Convention. He concluded by saying:

> " I therefore request the Supreme Court in Washington to examine whether the decree No. 7 of the Military Government of Germany may be applied in my case, and whether with due regard to the regulations of Articles 60–65 of the Geneva Convention, the present Military Court II, Nuremberg, was in a position to pass sentence on me."

Milch's application for leave to file a petition for a writ of habeas corpus was submitted to the Supreme Court for its consideration when it reconvened on 6th October, 1947, and on 20th October, 1947, the Court entered the following order:

> " The motion for leave to file petition for writ of habeas corpus is denied. Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Murphy and Mr. Justice Rutledge are of the opinion that the petition should be set for hearing on the question of the jurisdiction of this Court. Mr. Justice Jackson took no part in the consideration or decision of this application."

Chief Justice Vinson, Mr. Justice Reed, Mr. Justice Frankfurter and Mr. Justice Burton voted for the denial.

B. NOTES ON THE CASE

1. ILLEGAL EXPERIMENTS AS WAR CRIMES AND CRIMES AGAINST HUMANITY

While finding Milch himself not guilty under Count Two, the Tribunal expressed certain opinions as to the characteristics of legal and illegal medical experiments.

The judgment of the Tribunal indicated that the *corpus delicti*, as far as Count Two of the Indictment was concerned, would be established if it were shown that low-pressure and freezing experiments were carried on which were " of a character to inflict torture and death on the subjects ".(1) In finding that the *corpus delicti* had been proved the Tribunal pointed out (i) that the experiments were carried out " under the specious guise of science " and that under the specific guidance of Dr. Rascher, the air pressure was reduced to a point which no flier would ever be required to undergo ";(2) and (ii) that there was no credible evidence that the subjects of the experiments were " habitual criminals who had been sentenced to death ".(3)

From Judge Musmanno's remarks(4) it seems that, in his opinion, the experiments would not be legal unless they were performed upon prisoners actually condemned to death previously by a court with authority to declare " that the execution would be accomplished by means of a low-pressure chamber ", which actually did so declare, and " after bona fide proof that the subject had committed murder or any other legally recognized capital offence " ; and even then only if the experiments were painless and were

(1) See p. 35.
(2) See p. 36.
(3) See p. 36.
(4) See p. 45.

of scientific value. Judge Musmanno made it clear that " political prisoners marked for extermination " would not fall within the category of persons found to have committed a " legally recognized capital offence ".

Allegations of responsibility for illegal experiments were made also in the *Trial of Karl Brandt and Others* (The *Doctors' Trial*) and in the *Trial of Oswald Pohl and Others.* Both trials were held before United States Military Tribunals in Nuremberg, the former from 21st November, 1946, to 20th August, 1947, and the latter from 10th March, to 3rd November, 1947.(1) The Judgment in the *Pohl Trial*, which was delivered after those in the *Milch Trial* and *Doctors' Trial*, did not expand upon the legal aspects of the conducting of medical experiments and was content to state : " The fact that criminal medical experiments were performed upon the involuntary inmates of concentration camps has been repeatedly proved and determined before these Tribunals, in the case of *United States* v. *Karl Brandt, et al.* (Tribunal I), in the case of *United States* v. *Erhard Milch*, tried before this Tribunal, and by ample and convincing proof in the instant case. To completely document this finding of fact would result in unduly prolonging this judgment. It is sufficient to state that the performance of such criminal medical experiments has not been seriously denied. Defendants have unanimously denied knowledge of or participation in such experiments, but the proof of their performance stands substantially uncontradicted " ; and then to set out a very brief account of the actual experiments proved to have taken place.

The Judgment delivered in the *Doctors' Trial*, however, includes the following passages under a heading : *Permissible Medical Experiments :*

> " The great weight of the evidence before us is to the effect that certain types of medical experiments on human beings, when kept within reasonably well-defined bounds, conform to the ethics of the medical profession generally. The protagonists of the practice of human experimentation justify their views on the basis that such experiments yield results for the good of society that are unprocurable by other methods or means of study. All agree, however, that certain basic principles must be observed in order to satisfy moral, ethical and legal concepts :
>
> > " 1. The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent ; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion ; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment ; the method

(1) Considerations of time and space will prevent a full report of these two trials from being made in the present series. Some further reference to the two sets of proceedings have, however, already been made, to the *Doctors Trial*, in Volume IV of these Reports, pp. 91-93 and to both in Volume VI p. 104. None of the references made to the *Pohl Trial* in the present notes require any modification in the light of the Supplemental Judgment delivered on 11th August, 1948, by the Tribunal which conducted that trial.

and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

" The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

" 2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.

" 3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.

" 4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

" 5. No experiment should be conducted where there is an *a prior* reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.

" 6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

" 7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.

" 8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.

" 9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.

" 10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

" Of the ten principles which have been enumerated our judicial concern, of course, is with those requirements which are purely legal in nature—or which at least are so closely and clearly related to matters legal that they assist us in determining criminal culpability and punishment. To go beyond that point would lead us into a field that would be beyond our sphere of competence. However, the point need not be laboured. We find from the evidence that in the medical experiments

which have been proven, these ten principles were much more frequently honoured in their breach than in their observance. Many of the concentration camp inmates who were the victims of these atrocities were citizens of countries other than the German Reich. They were non-German nationals, including Jews and ' asocial persons ', both prisoners of war and civilians, who had been imprisoned and forced to submit to these tortures and barbarities without so much as a semblance of trial. In every single instance appearing in the record, subjects were used who did not consent to the experiments ; indeed, as to some of the experiments, it is not even contended by the defendants that the subjects occupied the status of volunteers. In no case was the experimental subject at liberty of his own free choice to withdraw from any experiment. In many cases experiments were performed by unqualified persons ; were conducted at random for no adequate scientific reason, and under revolting physical conditions. All of the experiments were conducted with unnecessary suffering and injury and but very little, if any, precautions were taken to protect or safeguard the human subjects from the possibilities of injury, disability, or death. In every one of the experiments the subjects experienced extreme pain or torture, and in most of them they suffered permanent injury, mutilation, or death, either as a direct result of the experiments or because of lack of adequate follow-up care.

" Obviously all of these experiments involving brutalities, tortures, disabling injury and death were performed in complete disregard of international conventions, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, and Control Council Law No. 10. Manifestly human experiments under such conditions are contrary to ' the principles of the laws of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience.' "

At a later point the Tribunal added :

" Another argument presented in briefs of counsel attempts to ground itself upon the debatable proposition that in the broad interest of alleviating human suffering, a State may legally provide for medical experiments to be carried out on prisoners condemned to death without their consent, even though such experiments may involve great suffering or death for the experimental subject. Whatever may be the right of a State with reference to its own citizens, it is certain that such legislation may not be extended so as to permit the practice upon nationals of other countries who, held in the most abject servitude, are subjected to experiments without their consent and under the most brutal and senseless conditions."

Elsewhere the Judgment dealt as follows with the fate of certain Polish women who had been used, without their consent, as the subjects of experiments :

" Moreover, assuming for the moment that they had been condemned to death for acts considered hostile to the German forces in the occupied territory of Poland, these persons still were entitled to the protection

of the laws of civilized nations. While under certain specific conditions the rules of land warfare may recognize the validity of an execution of spies, war rebels, or other resistance workers, it does not under any circumstances countenance the infliction of death or other punishment by maiming or torture."

A claim on the part of Germany to have the legal right to enact laws for the carrying out of euthanasia would certainly not legalize the murder of non-German nationals:

> " We have no doubt but that Karl Brandt—as he himself testified—is a sincere believer in the administration of euthanasia to persons hopelessly ill, whose lives are burdensome to themselves and an expense to the State or to their families. The abstract proposition of whether or not euthanasia is justified in certain cases of the class referred to, is no concern of this Tribunal. Whether or not a state may validly enact legislation which imposes euthanasia upon certain classes of its citizens, is likewise a question which does not enter into the issues. Assuming that it may do so, the Family of Nations is not obliged to give recognition to such legislation when it manifestly gives legality to plain murder and torture of defenceless and powerless human beings of other nations.
>
> " The evidence is conclusive that persons were included in the programme who were non-German nationals. The dereliction of the defendant Brandt contributed to their extermination. That is enough to require this Tribunal to find that he is criminally responsible in the programme."

It is to be observed that the " ten principles " set out above were introduced as " moral, ethical and legal concepts " ; the Tribunal did not differentiate between those legally necessary and those not, either in enumerating them or in setting out its reasons for finding, on the evidence, that they " were much more frequently honoured in their breach than in their observance ". On the other hand, the Judgment was clear and definite in declaring illegal the infliction of punishment by maiming or torture upon spies, war rebels and other resistance workers, who have been, however legally, condemned to death and the Judgments in the *Milch Trial* and in the *Doctors' Trial* certainly go some way towards elaborating the nature of such experiments as may constitute war crimes or crimes against humanity. It may also be noted that the relevant Counts contained in the Indictment in the *Doctors' Trial* and in the *Milch Trial* charged, *inter alia*, responsibility for " plans and enterprises involving medical experiments *without the subjects' consent* " (Italics inserted), and that the analogous wording in the Indictment in the *Pohl Trial* was: " The murders, torture and ill-treatment charged were carried out by the defendants by divers, methods, including . . . medical, surgical, and biological experimentation on *involuntary* human subjects ". (Italics inserted). The wording of the Judgments in the *Doctors' Trial* and in the *Pohl Trial* indicates that Pohl and others were found guilty of war crimes and/or crimes against humanity under these Counts ; for instance, it is said that Pohl's connection with the medical experiments previously described in the judgment consisted in knowingly supplying the subjects from the inmates of concentration camps, and of Karl Brandt his Judges ruled: " We find

that Karl Brandt was responsible for, aided and abetted, took a consenting part in, and was connected with plans and enterprises involving medical experiments conducted on non-German nationals against their consent, and in other atrocities, in the course of which murders, brutalities, cruelties, tortures and other inhumane acts were committed. To the extent that these criminal acts did not constitute war crimes they constituted crimes against humanity ".(1)

2. DEPORTATION AND SLAVE LABOUR AS OFFENCES AGAINST CIVILIANS

Judge Phillips, in his concurring opinion, made some interesting remarks on deportation of civilians as a war crime or crime against humanity, and based his views upon, *inter alia*, Article 52 of the Hague Regulations and Articles II (1) of Control Counsel Law No. 10.(2)

In their closing statement, the Prosecution made certain submissions which were much the same as the principles set out by Judge Phillips. Elaborating upon the first principle, the Prosecution stated that :

> " The illegality of the deportation of civilians in territories under belligerent occupation was demonstrated in the First World War when the Germans attempted a deportation programme of Belgian workers into Germany. This measure met with world-wide protest and was abandoned after about four months.
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> " Among the voices raised in protest against the deportation of Belgians by Germany in 1916–1917 was that of Lansing, Secretary of State. He wrote :
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> " ' The Government of the United States has learned with the greatest concern and regret of the policy of the German Government to deport from Belgium a portion of the civilian population for the purposes of forcing them to labour in Germany, and is constrained to protest in a friendly spirit but most solemnly against this policy which is in contravention of all precedent and all principles of international practice which have long been accepted and followed by civilized nations in their treatment of non-combatants in conquered territory.' Other protests were lodged with the German Government by Spain, Switzerland, Netherlands and Brazil, all neutral countries. International lawyers all over the world condemned Germany's action in the strongest terms.
>
> " The opposition in the German Reichstag accused the Government of violating the Hague Convention and refused to vote for the war budget.
>
> " It is worthy of note, in passing, that the defendant has testified at this trial that he knew of this effort at deportation of labour on the part of Germany in the First War and that he was much interested in the investigation conducted by a Reichstag Committee concerning this matter. He could not have followed this investigation, as he admits he

(1) Illegal medical experiments were also involved in the facts proved in the trial of Hoess by the Polish Supreme National Tribunal. See pp. 14–15 and 24–26.
(2) See pp. 45–47.

did, without learning that the deportation in question was violation of international law."

As far as war crimes are concerned, it could be added that the Nuremberg International Military Tribunal also ruled that " The laws relating to forced labour by the inhabitants of occupied territories are found in Article 52 of the Hague Convention ".(1) The Judgment, after quoting the Article, continues: " The policy of the German occupation authorities was in flagrant violation of the terms of this convention, and the account which it gave to illustrate this finding indicates that it interpreted widely the words " taking part in military operations against their own country " so as to include any work for the German war effort, including " German industry and agriculture ", and not merely " work on German fortifications and military installations ": all of the foregoing types of labour are mentioned in the Judgment.(2)

Certain remarks were made by the Tribunal which conducted the *Milch Trial* on Article II of Control Council Law No. 10 in relation to deportation and slave labour.(3) It may be convenient to quote here the relevant provisions of Article II:

" 1. Each of the following acts is recognized as a crime:

" (*b*) War Crimes. Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

" (*c*) Crimes Against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

The Prosecution had pointed out that " Article II (1) (*b*) lists under war crimes ' ill-treatment or deportation to slave labour *or for any other purpose* of civilian population from occupied territories ' ", and, they claimed, " It is clear that Law No. 10 established the following separate and distinct crimes: ill-treatment of civilians from occupied territories; deportation to slave labour of such civilians; and deportation for any other purposes of such civilians ". Again, " Control Council Law No. 10 has . . . unconditionally condemned, *as a crime against humanity, every* instance of the deportation of civilians ". The Tribunal would appear to have agreed that for a deportation to become a war crime or a crime against humanity it need not have had enslavement as its object.

(1) British Command Paper Cmd. 6964, p. 56.
(2) *Ibid*, pp. 57-60. This point is dealt with at greater length in Chapter IX of the *History of the United Nations War Crimes Commission*, London, 1948, pp. 227–229.
(3) See pp. 46-47.

At this point it is interesting to glance at the attitude taken by certain other war crimes laws and courts to the question of deportation as a war crime. Thus, in passing judgment on Hauptsturmführer Konstatin Wagner in October, 1946, the Eidsivating Lagmannsrett ruled that the deportation of 531 Norwegian Jews was a war crime at variance with the laws of humanity and the laws and customs of war. The Supreme Court of Norway, while reducing the sentence passed upon Wagner, did not upset this ruling. It should be added, however, that the Lagmannsrett had also found that, when taking part in the deportation, the accused knew that the victims faced slavery and many of them death ; further, the charges against the accused were charges of bringing about slavery and death.(1)

In practice, of course, the questions of deportation and enslavement have usually arisen simultaneously for consideration by the Courts trying war criminals, but there are many indications that deportation for any purpose is recognized as a war crime. For instance the French Ordinance of 28th August, 1944, concerning the suppression of war crimes, provides, in its Article 2 (5) that :

> " (5) Illegal restraint, as specified in Articles 341, 342 and 343 of the *Code Pénal*, shall include forced labour of civilians and deportation for any reason whatever of any detained or interned person against whom no sentence which is in accordance with the laws and customs of war has been pronounced."(2)

The definition of " war crime " under Australian Law also includes " deportation of civilians,(3) as did the list of war crimes drawn up by the Responsibilites Commission of the Paris Peace Conference in 1919, on which the Australian catalogue of war crimes was based. According to Article III of the Chinese War Crimes Law of 24th October, 1946, the term " war criminal " includes " Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as (*a*) killing, starving, massacring, enslaving, or mass deportation of its nationals " ; while Article 3 ( ) of the Yugoslav War Crimes Law of 25th August, 1945, provides, *inter alia*, that " forced deportation or removal to concentration camps " by enemy nationals are war crimes. The jurisdictional provisions of most of the instruments governing United States Military Commissions state that " deportation to slave labour or for any other purpose of civilian population of or in occupied territory " or "deportation to slave labour or for any other illegal purpose" of such persons, shall be regarded as war crimes.(4)

The Tribunal which tried Milch stated that *under certain conditions* deportation of civilians became a war crime, thus leaving open the possibility of there being a legal deportation. Nevertheless the account given of

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(1) This trial has also received mention in Vol. V of this series, p. 17.
(2) See Vol. III of these Reports, p. 96, and also p. 52.
(3) See Vol. V, p. 95.
(4) See Vol. III, pp. 106-107.

the first of these conditions made it clear that all instances which would usually be regarded as war crimes fell within the Tribunals' definition.(1)

Of the claim that agreements had existed between the German Government and the Vichy authorities for the deportation of persons from France into Germany, the Prosecution in the *Milch Trial* pointed out that " Many of the Vichy Government's highest officials who held office by reason of and under the protection of Nazi power, have been punished for treason by the present legitimate government " and claimed that " the agreements themselves were illegal—because they were exacted under duress, and because they were void *ab initio* because of their immoral content. It is common knowledge that even the puppets of Vichy did not of their own accord agree to the Nazi deportation measures. It is equally clear that these agreements were *contra bonos mores*. Then, too, it was illegal for any French Government, to conclude agreements which provided for the compulsory mass deportation of French workers to aid the enemy's war effort. At the time of the agreement between Germany and Vichy there was merely a state of suspension of hostilities. French resistance had not ceased, and the outcome of the war continued to be uncertain. Lastly, the deportation agreements were invalid because their manifest purpose was to aid Germany in the commission of the crime of aggressive war. That an agreement in furtherance of an act which is illegal in international law is invalid has been stated by various authorities. For example, Professor Charles Cheney Hyde of Columbia University defines as internationally illegal " agreements which are concluded for the purpose of, and with a view to, causing the performance of acts which it (international law) prescribes ".

The Prosecution continued :

" Professor Hall, page 382 of the 8th Edition of *International Law* (1924), declares :

> " ' The requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of International Law and their undisputed applications.'

" Lauterpacht on *International Law* by L. Oppenheim, at Vol. 1, page 706, states :

> " ' It is an unanimously recognized customary rule of international law that obligations which are at variance with universally recognized principles of International Law cannot be the object of a treaty '."

The Defence on the other hand, claimed that " the rules of the Hague Land Warfare regulations can be suspended between two States. I have given proof of the fact that there were between Germany and France agreements whereby the French population had to make themselves available for work in Germany, first, by volunteering, and later, on the basis of a law for compulsory labour issued by the French Government. No restrictions were laid down to what extent and for what purpose these people were to be employed.

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(2) See pp. 45–46.

" The objection has been raised that the Vichy Government was a government of traitors, but it was that government which concluded the armistice with Germany, and throughout the war all Frenchmen, including those in De Gaulle's camp, would raise passionate protests when they thought that one of its articles had been violated. Thus, they all acknowledged that an armistice could be concluded, and was concluded. Once you acknowledge the existence of an armistice agreement, you cannot, logically or legally, deny the legality of the government which has concluded the armistice. You must eat your cake as it is and you must not pick out the plums alone."

The Tribunal, however, ruled that " the Vichy Government was a mere puppet set up under German domination " ;(1) which would seem to indicate that the Tribunal regarded any such contract as that claimed by the Defence, to be void on the grounds of the incapacity of one of the parties. Judge Phillips's opinion seems to strengthen this impression.(2) It has been said that " A State possesses therefore, treaty-making power only so far as it is sovereign . . . Not full sovereign States . . . can become parties only to such treaties as they are competent to conclude ",(3) and that, while " war was a legitimate means of compulsion, and consent given in pursuance thereof could not properly be regarded as tainted with invalidity," the position " has now probably changed in so far as war has been prohibited by the Charter of the United Nations and the General Treaty for the Renunciation of War ".(4) It must be admitted, however, that, once the status of France (after her defeat) as an occupied territory within the meaning of the Hague Regulations has been established, it would seem to follow that her inhabitants could not have been deprived of their rights under those Regulations by any authority, and that no need really arose to call upon the rules relating to the conclusion of treaties by sovereign or partly sovereign States.

The judgment of the Tribunal which conducted the *Pohl Trial*(5) made the following remarks regarding the use of slave labour from occupied territories :

" The freedom of man from enslavement by his fellow men is one of the fundamental concepts of civilization. Any programme which violates that concept, whether prompted by a false feeling of superiority or arising from desperate economic needs, is intolerable and criminal. We have been told many times, ' Germany was engaged in total war. Our national life was endangered. Everyone had to work '. This cannot mean that everyone must work for Germany in her waging of criminal aggressive war. It certainly cannot mean that Russian and Polish and Dutch and Norwegian non-combatants, including women and children, could be forced to work as slaves in the manufacture of war material to be used against their own countrymen and to destroy their own homelands. It certainly cannot mean, in spite of treaties and all rules of civilized warfare (if warfare can ever be said to be civilized), that prisoners taken in battle can be reduced to the status of

(1) See p. 38.
(2) See p. 46.
(3) Oppenheim-Lauterpacht *International Law*, Vol. I, Sixth Edition, pp. 795-6.
(4) *Ibid*, p. 803.
(5) See p. 49.

slaves. Even Germany prior to 1939 had repudiated any such fallacious position. And yet, under the hypnotism of the Nazi ideology, the German people readily became complaisant to this strange and inhuman system. Under the spell of National Socialism, these defendants today are only mildly conscious of any guilt in the kidnapping and enslavement of millions of civilians. The concept that slavery is criminal *per se* does not enter into their thinking. Their attitude may be summarized thus : " ' We fed and clothed and housed these prisoners as best we could. If they were hungry or cold, so were the Germans. If they had to work long hours under trying conditions, so did the Germans. What is wrong in that ? ' When it is explained that the Germans were free men working in their own homeland for their own country, they fail to see any distinction. The electrically charged wire, the armed guards, the vicious dogs, the sentinel towers—all those are blandly explained by saying, ' Why, of course. Otherwise the inmates would have run away.' They simply cannot realize that the most precious word in any language is ' liberty '. The Germans had become so accustomed to regimentation and government by decree that the protection of individual human rights by law was a forgotten idea. The fact that the people of the eastern territories were torn from their homes, families divided, property confiscated, and the able-bodied herded into concentration camps, to work without pay for the perpetrators of these outrages—all this was complaisantly justified because a swollen tyrant in Berlin had scribbled ' H.H.' on a piece of paper. And these are the men who now keep repeating, ' *Nulla pæna sine lege.*' "

There is also some similarity between the judgments delivered in the *Milch Trial* and the judgment delivered in the *Justice Trial.* The latter held the *Nacht und Nebel* plan to be illegal on the grounds, *inter alia*, of the illegality of the deportation of inhabitants of occupied territories. The " inhumane treatment " of relatives and friends who were left without trace of the victims was also stressed.(1)

3. DEPORTATION AND SLAVE LABOUR AS OFFENCES AGAINST PRISONERS OF WAR

In his closing statement, the Defence Counsel made the following submission :

" I shall begin by examining the question as to what extent the Hague Convention on land warfare and the Geneva Convention of 1929 were valid for the treatment of Russian prisoners of war. By the statements of witness von Neurath it has been confirmed that the U.S.S.R. in 1919 specifically withdrew from the Hague Convention on land warfare as well as the former Geneva Convention. Jurists will not dispute the fact that a formal withdrawal from agreements is of greater importance in the relations between states than the act of joining such a convention. Even if one were of the opinion that the Hague Convention on Land Warfare and the Geneva Convention represented merely the codification of already existing international law, so that

(1) See Vol. VI, pp. 56–58.

also the State that did not join the conventions would be bound to this already existing international law in all details, even in such a case the expressly stated withdrawal from such a convention must mean also a withdrawal from the natural international law. If this were not the case, the withdrawal from such conventions would be an act without meaning which so intelligent politicians as those to be found in the USSR would never have undertaken. Nor is this conception of mine contradicted by the expert opinion offered in the first Nürnberg Trial (Canaris Document No. EC–338) because this expert opinion is only concerned with the order of Hitler and Keitel regarding the killing and cruel treatment of prisoners. It is of course clear that inhumane acts do not become permissible even through withdrawing from a convention. What we must examine here, however, is purely the question whether or not, and for what activities, such prisoners of war may be used. Detailed regulations of international law, which in themselves do not contain atrocities, can, in my opinion, be nullified by expressly withdrawing from a convention codifying existing international law. Finally we wish to draw the attention to Article 82 paragraph 2 of the Geneva Convention of 1929 which contains the following regulation: ' If in wartime one of the belligerents is not a member of the convention the regulations of this convention remain valid, nevertheless, for the belligerents who have signed the convention.' This does not mean that the signatories are bound to the Geneva Convention also with regard to the treatment of soldiers of a non-signatory power, but only with regard to soldiers of the signatories who are at war. Article 82 paragraph 2 of the Geneva Convention, therefore, states that with regard to the relations of non-signatories the convention is not valid. The regulation was made so that it should not be thought that if a non-signatory participated in the war the Geneva Convention would not apply to that war."

Elsewhere, Defence Counsel said: " So far as the Italian prisoners of war are concerned, the evidence has shown that the Mussolini Government, which at the time was the covenant Government in that part of Italy not occupied by the allied forces, made them available for work in the armament industry, especially after Germany had to manufacture armaments for Mussolini's Italy."

In replying, the Prosecution recalled that:

" The defendant has offered, as a plausible reason for the employment of Russian, French and Italian prisoners of war, the fact that various historical events made it unnecessary to abide by the terms of the Convention concerning prisoners of war. The witness von Neurath testified that Russia had renounced the Conventions in question, and hence Germany could renounce them as to Russia. As for France, it is contended that the alleged Government headed by Pierre Laval had concluded an arrangement with the Reich which made it legal to employ prisoners of war in tasks forbidden by the Conventions. A similar reason is advanced for the use of Italian the concluding of an arrangement between the Reich and Mussolini. The International Military Tribunal made a finding with respect to this matter (page 16892). ' The argument in defence of the charge with regard to the murder and

ill-treatment of Soviet prisoners of war, that the USSR was not a party to the Geneva Convention, is quite without foundation. On 15th September, 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, signed by General Reinecke on 8th September, 1941 '."

Counsel then quoted the passage from the Judgment of the International Military Tribunal which appears in the Judgment of Judge Musmanns in the trial of Milch(1) and continued:

" The defendant was a soldier of some experience, he knew it was improper, even criminal, to have the Russian prisoners work in the Luftwaffe factories, but he paid no attention to the breach of this duty of the soldier. The manner in which the Reich bludgeoned a treaty from the French is too well known to warrant discussion. It cannot be contended with any seriousness that the French prisoners of war, who were negotiated into slavery by a puppet government, were voluntary employed by the Germans. Indeed the witness Le Friec has testified that when he was taken to work in the airplane factory, he was told that he would ' work on baby carriages '."

Regarding the position of Italian prisoners of war and their illegal employment, the Prosecutor said: " The Wehrmacht had moved into Italy early in the war and in 1943, when the Badoglio Government concluded an armistice with the Allies, the Wehrmacht continued to occupy the northern part of Italy as an occupying Power. They allegedly made a treaty with the by then tottering shadow of the former sawdust Cæsar and proceeded to bring the Italian prisoners of war to the Reich to work. Here again the soldiery had been sold into bondage by their former chief. The record shows that the Russian, French and Italian prisoners of war were used to work in airplane factories. Whether they made the fighter plane, ME 109, or the jet fighter, ME 262, or the transport plane, JU 52, is of little moment. In the total warfare in which the Reich was engaged there is one certainty, that nothing was being constructed which was not part of the war armament programme.

" The International Military Tribunal stated in this connection (page 16915): ' Many of the prisoners of war were assigned to work directly related to military operations, in violation of Article 31 of the Geneva Convention. They were put to work in munitions factories, and even made to load bombers, to carry ammunition and to dig trenches, often under the most hazardous conditions. This condition applied particularly to Soviet prisoners of war '."

The Judgment ruled that, while the specific provisions of the Geneva Convention had not been binding between Germany and the USSR they were both bound by the principles of customary international law, which forbade the use of Russians on German guns.(2) Between parties to the Conventions, the use of prisoners of war to man guns was a violation of Article 31 of the Geneva Convention and Article 6 of the Hague Convention.(3) Article 9 of the former was also quoted.(4)

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(1) See pp. 43-44
(2) See pp. 43-44
(3) See p. 43 and also p. 47.
(4) See p. 44.

In ruling as it did the Tribunal must be taken to have overruled the submission of the Defence that in withdrawing from the Geneva Convention a state relinquished all rights even under the customary international law which was codified in the Convention, except for the protection against outright " inhumane acts ".(1)

The Indictment against Milch charged that: " Pursuant to the order of the defendant Milch, prisoners of war who had attempted escape were murdered on or about 15th February, 1944."

The Tribunal does not appear to have found that any specific prisoner of war was killed as a direct result of orders from the accused, but there was evidence,(2) of which the Tribunal took note in its judgment, that Milch had expressed the opinion that prisoners of war who attempted to escape should be shot. In its closing speech, the Defence had claimed that " All countries of the world have prisoners shot who attempt to escape."

The legality under certain circumstances of shooting a prisoner of war *while* trying to escape has certainly received recognition, as has been shown in reports appearing in earlier volumes in this series.(3) On the other hand it is not permissible to shoot a prisoner of war on recapture *on the grounds that* he attempted to escape. Thus, in the trial of Toma Ikeba and others by an Australian Military Court at Rabaul, 15th—16th May, 1946, three accused were awarded sentences of imprisonment for killing certain Indian prisoners of war who had been caught attempting to escape.

Nor is it permissible to shoot prisoners of war to *prevent their attempting* to escape, even though their intentions to make the attempt is known; this was shown by two other Australian cases tried at Rabaul, that of Teruma Hiranaka and one other on 13th May, 1946, and that of Kunito Hatakeyama and one other, on 14th–17th July, 1947.

Finally, a prisoner of war may not legally be shot if attempting to escape to save his life, according to the decision of a United States Military Tribunal, at Ludwigsburg, 22nd–24th January, 1946, in sentencing to life imprisonment Johann Melchior and Walter Hirschelmann on a charge of illegally killing two prisoners of war. The accused Melchior claimed that he shot one of the captured fliers to prevent his escape, but there was no evidence that the captives had made any attempt to escape until they found themselves confronted with three men with weapons in their hands under circumstances in which it was not unreasonable for the victims to assume that their lives were in danger.(4)

4. THE LIMITS OF THE RESPONSIBILITY OF A SUPERIOR FOR THE OFFENCES OF HIS SUBORDINATES

In their closing statement, the Prosecution quoted the decision of the United States Supreme Court in the case *in re Yamashita*;(5) it was claimed

(1) Compare the similar attitude of the Norwegian Supreme Court, as set out on pp. 119-120, of Vol. VI of this series.
(2) See p. 32.
(3) See Vol. I of these Reports, pp. 86-87, and Vol. III, p. 22.
(4) This trial has also been referred to in connection with the plea of superior orders. See Vol. V, p. 17.
(5) See Vol. IV of this series, pp. 38-49.

that " the facts of the Yamashita case are similar to those of the Milch case, and the opinion rendered by the Court is particularly in point in the matter of responsibility for senior officers."

The Prosecution pointed out that the Supreme Court had ruled that Articles 1 and 43 of the IVth Hague Convention of 1907, Article 19 of the Xth Hague Convention of 1907, and Article 26 of the Geneva Red Cross Convention of 1929 " plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized and its breach penalized by our own military tribunals "(1) The Prosecution continued :

> " In the cases of the medical experiments, we have a much less complex situation. There is no question of a senior officer in an occupied country, rather we are faced with a simple direct chain of command problem. Milch—Förster—Hippke. Had Milch given the order, the experiments would have been terminated, but no order of termination was given—people were murdered and Dr. Rascher remained in the Luftwaffe until he was transferred to the SS in March of 1943. The defendant had an affirmative duty to know what was going on, and an affirmative duty to act so as to stop the experiments. That he was ignorant of the true state of affairs in unbelievable in view of the letters and the testimony of those who were below him. Field-Marshals are not made as are non-commissioned officers . . . By holding the office which he held, he had the duty to control the activities of those who were his subordinates, to insure that they conducted themselves as soldiers and not as murderers. He has failed woefully in the task."

The Judgment of the Tribunal which conducted the *Milch Trial* did not refer to the decision of the Supreme Court, but in his concurring opinion Judge Phillips said : " The Tribunal in its majority opinion has fully considered the decision of the United States Supreme Court in the Judgment in *re Yamashita* and was found that said decision is not controlling in the case at bar." This statement must be taken to signify that the Tribunal had in fact discussed the relation of the Yamashita trial to the present proceedings during their deliberations *in camera.*

While not mentioning the Yamashita trial, the Tribunal set out in detail its reasons for finding Milch not responsible for illegal medical experiments.(2) In concurring, Judge Phillips said : " All of the testimony and the evidence, both for the Prosecution and the Defence is to the effect that the defendant Milch did not have such knowledge of the high altitude or low-pressure experiments which were carried out and completed by Luftwaffe physicians at Dachau until after the completion of such experiments. The evidence offered as to the knowledge or responsibility of the defendant Milch was not such a nature as to show guilty knowledge on his part of said experiments."

Of the " cooling or freezing " experiments, he said :

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(1) *Ibid*, p. 44.
(2) See pp. 36-37.

" In weighing the evidence, the Tribunal was mindful of the fact that the defendant gave the order and directed his subordinates to carry on such experiments, and that thereafter he failed and neglected to take such measures as were reasonably within his power to protect such subjects from inhumane treatment and deaths as a result of such experiments. Notwithstanding these facts, the Tribunal is of the opinion that the evidence fails to disclose beyond a reasonable doubt that the defendant had any knowledge that the experiments would be conducted in an unlawful manner and that permanent injury, inhumane treatment or deaths would result therefrom.

" Therefore, the Tribunal found that the defendant did not have such knowledge as would amount to participation or responsibility on his part and therefore found the defendant not guilty on charges contained in Count No. 2."

It will be noted that Milch was found not guilty under Count Two of the Indictment because the Tribunal was not satisfied that he knew of the illegal nature of the experiments carried out by persons in his command ; no duty to find whether they had such a nature is mentioned.

On the other hand, it will be recalled that, in certain passages from the judgment delivered in the *Doctors' Trial* which were quoted on pages 91–93 of Volume IV of these Reports, it was made clear that there could exist a duty on the part of a superior to take reasonable steps to find the nature of medical experiments carried on by persons under his command. The Tribunal ruled, *inter alia*, that " Occupying the position he did and being a physician of ability and experience, the duty rested upon him (Karl Brandt) to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps."(1)

It may be that the fact that Milch was not " a physician of ability and experience ", and the circumstance that " His position involved vast responsibilities covering a wide industrial field, and there were certainly countless subordinate fields within the Luftwaffe of which he had only cursory knowledge ", including the conduct of medical experiments,(2) go far towards explaining why his judges excused Milch of a duty to discover whether the experiments carried out by persons within his general command were of a legal character.

In the judgment in the *Pohl Trial*,(3) the accused Erwin Tschentscher, who had been a battalion commander of a supply column, and a company commander, on the Russian Front during 1941, was held not responsible for the murder of Jewish civilians and other non-combatants in Poland and the Ukraine by members of his commands at that time. The Tribunal found that he had no " actual knowledge " of these offences, and added that the decision of the Supreme Court in the *Yamashita Trial* " does not apply to the defendant Tschentscher ", for " Conceding the evidence of the

(1) See Vol. IV, p. 92.
(2) See the Judgment of the Tribunal, on pp. 36-37 of the present volume.
(3) See p. 49.

Prosecution to be true as to the participation of subordinates under his command, such participation by them was *not of sufficient magnitude or duration* to constitute *notice* to the defendant, and thus give him an opportunity to control their actions. Therefore, the Tribunal finds and adjudges that the defendant Tschentscher is not guilty of participating in the murders and atrocities committed in the Russian campaign as alleged by the prosecution."(1)

5. THE PLEA OF MISTAKE OF LAW

Judge Toms recalled that the defendant had claimed to have been advised that it was not unlawful to employ prisoners of war in war industries.(2) He rejected this plea, not on the grounds that a mistake of law, as opposed to a mistake of fact, is never an excuse, but on the grounds that it was unlikely that Milch could actually have been so mistaken. Other examples of the apparent reluctance of legal authorities to apply to the full the maxim *ignorantia juris non excusat*, the relevant law being international law, have already been noted.(3) It would seem that an accused is not expected to be as well acquainted with rules of international law as with his own municipal law, which touches more frequently or closely upon his own everyday experience.

6. THE PLEA OF NECESSITY

The Defence, in their closing statement, urged that: " The validity of the regulations laid down in the Hague Convention for Land Warfare can be cancelled by a special factor which precludes lawlessness. In all codes of law of the civilized world the law of so-called emergency situations exists. This conception of law must also be applied to international law. That Germany was in an emergency situation in that sense that the use of the civilian population for labour in the occupied territories was only caused by the emergency situation, I have shown in detail a little while ago. Modern war means total war and as such has suspended, in several points, international law as it existed up to now. It is uncontested that according to the Hague Convention for Land Warfare actions of combat against the civilian population are forbidden. Modern air warfare, having as its aim total annihilation or armament and production of the enemy, brought with it to a great extent warfare against the civilian population without any of the belligerents regarding such combat actions as forbidden according to the Hague Convention on Law Warfare. This also applies to the total blockade of a country which aims at starving the population of that country. These comprehensive ways of waging war which hit all classes of the population permit, in my opinion, to a state which is at war, especially on account of the fact that its civilian population is brought into the strife, to use for its purposes labour from occupied countries so as to maintain its production and armament."

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(1) Italics inserted. Compare Vol. IV, pp. 85-6 and 94-5.

(2) The defendant's Counsel put forward this plea in a way which is réminiscent of the way in which the plea of superior orders has so frequently been argued: " How should Milch, who is not a legal expert, who as a layman did not understand anything about applicable International Law, how could he form a different opinion ? "

(3) See Vol. V of this series, p. 44.

As has been seen, however, the Tribunal did not allow this plea of necessity, and Judge Musmanno made some remarks on his own attitude to it.(1)

7. THE PLEA OF SUPERIOR ORDERS

The Tribunal expressed certain conclusions regarding what amounted to a plea of superior orders.(2) It seems fair to summarize the decision of the Tribunal by saying that it rejected the plea on the grounds that the superior orders relied upon related to the waging of a war of aggression and involved the commission of " ruthless acts of persecution and terrorism ", and that the defendant *must have known* that the orders were in these ways illegal. This finding is interesting in that it represents the first instance reported in these volumes in which the illegal nature of aggressive war has been related to the principle that the plea of superior orders can only be effective if the orders were legal or if the accused could not reasonably be expected to be aware of their illegality.

The Tribunal also pointed out that the accused began his alleged course of action long before the outbreak of war, " at a time when there was no claim upon the loyalty of the defendant as a soldier to protect his homeland at war ".(3) This seems to be a recognition that, whatever the effectiveness of the plea of superior orders, such effectiveness would be greater in conditions of war-time than during time of peace.(4)

In their opening statement, the Prosecution submitted that :

> " This defendant cannot plead in truth that he did not know that the use of slave labour was wrong. He cannot use even the technical excuse so common among the Nazis that this was not illegal because the Nazi law authorized it. Official sanction of slavery would have been a law so evil that even the Nazi masters dared not proclaim it. A search through the mass of decrees and pronouncements which passed for law during the régime of Adolf Hitler fails to reveal sanction for slavery of foreign labourers. On the other hand certain prohibitory laws survived from a more respectable day.
>
> " Paragraph 234 of the German Criminal Law (*Strafegesetzbuch*, 11th edition, Beck 'sche Verlagsbuchhandlung, Munich and Berlin, 1942, pages 364–365) provides that ' whosoever seizes a person by ruse, threat or force in order to expose him in a helpless situation, and to bring him into slavery, serfdom and foreign Army and Navy service shall be punished for kidnapping with penal servitude.' This law was in force during the Nazi régime and was published in the most recent edition of German Criminal Law which we have been able to find."

A claim of legality under municipal law, even had it succeeded, would not, however, have constituted a complete defence, though it might have been considered as a factor in mitigation of punishment.(5)

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(1) See p. 44.
(2) See pp. 40-42.
(3) See p. 42.
(4) Compare Vol. V, pp. 18-19.
(5) *Ibid*, pp. 22-24.

8. MILCH'S APPLICATION TO FILE A PETITION FOR A WRIT OF HABEAS CORPUS

Milch's motion for leave to file a petition for a writ of habeas corpus was denied by the Supreme Court of the United States and the Court entered an order to which reference has already been made.(1)

The applicant's plea that he was tried in violation of Articles 60-65 of the Geneva Prisoner of War Convention calls for no treatment here beyond a reference to previous findings that the section of the Convention into which these provisions fall does not apply to offences committed by prisoners of war before their capture.(2)

In rejecting the motion, the Supreme Court did not entertain arguments. It seems likely that the difference in treatment of Milch's motion and that of Yamashita(3) arose out of the fact that Milch's petition was treated as an original application whereas the *Yamashita Case* came up through appellate channels from the Supreme Court of the Philippines at a time when the Philippines were a dependency of the United States.(4)

The difference between the original and appellate jurisdiction of the Supreme Court is laid down in Article III, Section 2, of the United States Constitution which provides, *inter alia*, that :

> " In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make ".

The applicant could not claim to fall within the category of persons in whose cases the Supreme Court would have original jurisdiction. Nor does it appear that the military tribunal before which applicant was tried and convicted bears the same relationship to the judicial system of the United States as did the Supreme Court of the Philippines, over the proceedings of which the Supreme Court of the United States could exercise appellate jurisdiction.

It is suggested that the military tribunal which tried and convicted Milch was not a court-martial or military commission according to traditional usage. It was established by and acted under the authority of a Four-Power Agreement providing for the trial of Nazi war criminals, and as such would not, within customary construction, constitute a part of the judicial system of the United States for any purpose.

It may be noted that petitions for writs of habeas corpus submitted by war criminals convicted by United States military commissions at Dachau likewise have been treated as original applications and likewise have been denied by the Supreme Court for want of jurisdiction. The above discussion of the nature of the Tribunal which tried and convicted Milch should not be taken as an indication that the possible international nature of this Tribunal in any way affected the denial of Milch's application for a writ of habeas corpus.

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(1) See p. 47.
(2) See Vol. IV of these Reports, p. 78.
(3) See Vol. IV, pp. 38, *et seq.*
(4) *Ibid*, p. 37.

CASE NO. 40

TRIAL OF GUSTAV BECKER, WILHELM WEBER AND 18 OTHERS

PERMANENT MILITARY TRIBUNAL AT LYON
(CONCLUDED 17TH JULY, 1947)

Illegal arrest and ill-treatment as war crimes. The scope of complicity. Attempt as separate offence.

A. OUTLINE OF THE PROCEEDINGS

1. THE ACCUSED AND THE CHARGES

Twenty officers, non-commissioned officers and men of the former German Customs Commissariat at Annemasse, French Savoy, were on trial for illegal arrests of French citizens, some of whom they severely ill-treated, causing the deportation and subsequent death of three victims. Several accused were members of the Gestapo.

The principal defendants were Gustav Becker, Wilhelm Weber and Karl Schultz. They were prosecuted as joint perpetrators of the crimes charged. The other 17 defendants were prosecuted *in absentia* as accomplices to the crimes. Their names are: Rocktegel, Muhe, Gustscher, Zank, Koch, Mocker, Murr, Hartmann, Block, Forster, Schobert, Hofmann, Schoder, Langer, Staffa, Hof and Schade.

2. THE EVIDENCE

The evidence showed that all the accused, except Schultz, had taken part in the arrest of several innocent French inhabitants, and that they had subjected them to severe beating and other physical ill-treatment. One of the victims, Jean Hauteville, had an arm and several teeth broken. As a consequence of the arrests, the victims were deported to concentration camps in Germany. Three identified victims died there from further ill-treatment.

Schultz was acquitted for lack of evidence establishing that he had actually taken part in the commission of the above crimes. The others were found guilty of unlawful arrests and ill-treatment, and of having " caused death without intent to inflict it ".

3. FINDINGS AND SENTENCES

Seventeen defendants were convicted to 20 years' hard labour each, and two to three years' imprisonment each.

B. NOTES ON THE CASE

1. NATURE OF THE OFFENCES

The offences for which the above accused were found guilty comprise two distinct acts punishable under French law: illegal arrests and ill-treatment, whether or not resulting in death.

(a) Illegal Arrests

Convictions for illegal arrests were passed under Article 341 of the French Penal Code, whose relevant passage reads :

> " Those who, without order of the proper authorities and except cases in which the law prescribes the seizure of accused persons, arrest, detain or restrain any persons, shall be punished with a term of hard labour."

According to Article 342, if the detention has lasted over a month, the penalty is hard labour for life. Article 344 prescribes the same penalty if the arrest was made by using " false dress ", " false names ", or " false orders of the authorities ", or if the arrested person was threatened with death. If the person arrested, detained or restrained was subjected to physical torture, the punishment is death.

Illegal arrest or detention does not appear in the list of war crimes drawn up by the 1919 Commission on Responsibilities.(1) Neither is it explicitly mentioned in the Hague Regulations respecting the Laws and Customs of War on Land, of 1907. It has, however, emerged as a clear case of war crime in the course of developments which took place under the impact of the criminal activities of the Nazis and their satellites, during the second world war.

In the early stages of its activities, the United Nations War Crimes Commission decided that the following acts should be added to the 1919 list of war crimes :

> " Indiscriminate mass arrests for the purpose of terrorizing the population, whether described as taking of hostages or not."

This decision was made explicitly on the basis of the Preamble of the 4th Hague Convention concerning the Laws and Customs of War, 1907, which reads :

> " Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare, that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the laws of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."

It is not disputable that " indiscriminate mass arrests " are a violation of the above principles, usages and laws, as exemplified in particular in the penal law of civilized nations.

It can also be observed that illegal arrests, when carried out repeatedly, represent a clear case of " systematic terrorism " which appears as the first item in the 1919 List of war crimes. The fact that they also constitute a violation of the French national law, is relevant in that, according to

(1) *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, which was constituted by the Allied Powers on 25th January, 1919, at the Preliminary Peace Conference in Paris.

Article 43 of the Hague Regulations, 1907,(1) the German authorities were, as a rule, under the obligation to respect it.

The decision of the United Nations War Crimes Commission was made on the face of the evidence collected from occupied countries, that indiscriminate arrests and detentions of inhabitants, without due process of law, was a pattern deliberately implemented by the Nazis for the purpose of terrorizing the population and suppressing what the Nazis considered to represent an obstacle to their rule. Millions of peaceful and innocent people suffered from this policy and scores of thousands died as a result of it. The offences tried by the French Tribunal thus did not constitute isolated violations, but were part of a criminal policy pursued systematically and deliberately, and clearly fell within the terms of the above decision.

It should, however, be noted that, under the French Penal Code, illegal arrests need not be carried out systematically or *en masse* in order to constitute a criminal offence. Neither should it be taken that the decision of the War Crimes Commission is absolute in the sense that it excludes the punishment of even comparatively few cases of illegal arrests. The main issue is the principle which recognizes that unlawful arrests may be punished as war crimes, and which thereby contributes to defining more precisely the obligations of a power in occupied territory.

This principle has been confirmed in a number of other trials conducted by French courts. So, for instance, in the case against two German interpreters, Piffer and Tschander, who served in Kommandanturas set up in two French localities, the accused were convicted for illegally arresting and detaining nine French inhabitants.(2) In another trial an Italian, Ferrarese, who served the Gestapo in France, was sentenced to death for having caused the illegal arrest and detention, followed by torture, of 12 inhabitants.(3) Another Italian, Gallina, who also served the Gestapo in France, was condemned to death for making personally illegal arrests and ill-treating those apprehended.(4) A German Ortsgruppenleiter in a French locality, Pitz, was found guilty of complicity in the illegal arrest of individuals and of whole families, made on purely political grounds, and was sentenced to 5 years' imprisonment.(5)

In all cases the judgment was pronounced on the basis of Articles 341–344 of the Penal Code, quoted in the preceding pages.

(b) Ill-treatment

Convictions on the count of ill-treating the persons arrested, were passed under Article 309 of the Penal Code. Under its terms : " he who wilfully inflicts wounds or blows, or commits any other act of violence " resulting in illness or working incapacity for over 20 days, is punishable for from

(1) This Article reads : " The authority of the power of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country."
(2) Judgment of the Permanent Military Tribunal at Lyon, 30th October, 1947.
(3) Judgment of the Permanent Military Tribunal at Marseilles, 6th November, 1947.
(4) Judgment of the Permanent Military Tribunal at Lyon, 8th April, 1948.
(5) Judgment of the Permanent Military Tribunal at Metz, 8th October, 1947.

2 to 5 years' imprisonment. When such acts of violence are followed by " mutilation, amputation ", or other permanent infirmities, the penalty is solitary confinement with hard labour for from 5–10 years. If the acts of violence, committed " wilfully but without intent to inflict death ", have caused death, the penalty is hard labour for life.

Physical ill-treatment of inhabitants of occupied territory, as was the case in the trial under review, is included in the 1919 List of war crimes under the heading " torture of civilians " (item III). It is forbidden by implication under the terms of Articles 43 and 46 of the Hague Regulations. As already stressed, the first imposes the duty upon the occupying Power to ensure *inter alia*, " public safety " and to respect the laws of the occupied country, " unless absolutely prevented ". The second prescribes the obligation to respect, among others, " family honour and rights " and " individual life ". Physical ill-treatment also emerges as a violation of the laws of war from the declaration made in the previously quoted Preamble of the 4th Hague Convention. It is in the light of such evidence of the laws of war that ill-treatment was explicitly recognized as a war crime in Article 6 (b) of the Charter of the International Military Tribunal sitting at Nuremberg, where it is described as " ill-treatment of civilian population of or in occupied territory ".

The accused were held guilty for having caused, " without intent to inflict it ", the death of the ill-treated victims. As alleged by the Prosecution, and apparently admitted by the court, the evidence did not show that the death took place as a *direct* result of the ill-treatment personally committed by the accused. It apparently demonstrated that the accused had caused the victims' death by contributing to and making possible their deportation to Germany, where they died from further ill-treatment committed by other individuals. Theirs was, thus, the guilt of accomplices, which will be discussed in the next paragraph.

2. THE SCOPE OF COMPLICITY

As previously stressed, two of the accused, Becker and Weber, were convicted as perpetrators of the illegal arrests and ill-treatments, and the remaining 17 accused as their accomplices.

There is not much to be said in regard to the latters' complicity in the carrying out of arrests and the ill-treatment in which they personally took part. It is a principle of penal law that accomplices are held responsible in the same manner as actual perpetrators, and this principle is recognized in the field of war crimes as it is in that of common penal law.

The point of interest in this case is that all the accused, perpetrators and accomplices, were found guilty of the death of the victims which took place in Germany. According to the formula used by the court on the basis of Article 309 of the Penal Code, they were found guilty of having " caused death without intent to inflict it ". It is not clearly indicated in the judgment whether the ill-treatment inflicted in France was of such a nature as to cause in itself the victims' death after they had been removed to Germany. There is, however, some ground to believe that the Tribunal may have found the accused responsible as instrumental to the death inflicted upon the victims' at the hands of the other perpetrators in Germany.

Further forms of complicity are illustrated in other French trials concerning illegal arrests. In one of the trials previously referred to, the accused, Ferrarese,(1) was convicted not for having personally arrested and detained innocent French inhabitants, but for having *caused* their arrest and detention. Ferrarese, an Italian national, came to France in 1934 from Brazil. He settled down, married a French woman, and lived in Marseilles. During the war he became a secret agent of the Gestapo. Being a Catholic, he gained the confidence of a French Catholic priest, Paul Ardouin, who was a member of the French resistance movement and distributed resistance leaflets and pamphlets among his compatriots. Ferrarese denounced him to the Gestapo, which arrested the priest and deported him to Germany. The accused carried out this activity throughout the war and denounced a large number of French Catholic priests and other French citizens involved in the resistance movement. They were all arrested and tortured, and some were deported. The accused was condemned to death under Article 341 of the Penal Code, for having " caused the arrest, detention " and torture of the victims.

In another trial, also previously mentioned, the accused, Pitz, (2) a Nazi party administrator in Sierck, French Lorraine, was found guilty of having " aided or assisted " in the arrest and deportation of numerous French inhabitants in the area, by drawing up lists and submitting them to the authorities which made the arrests. He tried to induce French youths to enlist in the German army, which they refused to join. Upon his reporting to this effect they were arrested, interned and forcibly drafted in the Wehrmacht, and their families were deported to Germany. In July, 1942, he asked the French population to state openly whether they wanted to become Germans. Those unwilling had to report their names for transfer to other parts of France. Most of the latter were deported to Germany upon lists prepared by the accused. He was convicted to five years' imprisonment.

Special attention should be drawn to the case of complicity committed by means of denunciation. The question as to whether and to what extent denunciation is a crime in itself, was studied by the United Nations War Crimes Commission in connection with specific cases brought by member governments. A decision was made to the effect that denunciation did not in itself, constitute a war crime. The offence is committed only if, by giving information, the informer becomes a party to, or accomplice in, a war crime recognized as such in international law. This condition is fulfilled if circumstances constituting complicity are present, e.g., if the informer knew that his action would lead to the commission of a war crime and either intended to bring about this consequence or was recklessly indifferent with regard to it. This decision was applied by the War Crimes Commission in numerous instances.

It thus appears that, according to the above decision, denunciation is not punishable in itself, but only if it has resulted in a war crime and taken the shape of complicity in the traditional sense. This condition was present in the circumstances of the trial referred to above, the individuals denounced

(1) Judgment of the Permanent Military Tribunal at Marseilles, 6th November, 1947.
(2) Judgment of the Permanent Military Tribunal at Metz, 8th October, 1947.

by the accused (Ferrarese) having all been arrested, detained, some of them tortured and deported, and the accused having deliberately sought these consequences.

In French municipal law, however, denunciation is regarded as a crime in itself. By an Ordinance of 31st January, 1944, concerning the Suppression of Acts of Denunciation (*Ordonnance relative à la répression des faits de dénonciation*), Article 83 of the French Penal Code was interpreted so as to include denunciation as a separate offence. Article 83, last paragraph, renders punishable " acts knowingly committed which are harmful to the national defence ", and which, technically, do not fall within the notion of treason, espionage, or other " injury to the external security of the State " (*atteinte à la sûreté extérieure de l'Etat*), as covered by Articles 75–87 of the Penal Code. The latter entail heavy punishments, including the death penalty, whereas the former entail only imprisonment of from one to five years. In all cases the persons liable to punishment are both French citizens and foreigners. The Ordinance of 31st January, 1944, prescribed that acts of denunciation were regarded as " harmful to the national offence", and were, therefore, cases covered by Article 83, last paragraph. Denunciation is described as giving information to enemy authorities or to the French quisling administration or organizations, concerning, *inter alia*, " facts relating to the resumption of the struggle against Germany and her Allies, or the refusal to associate with those who did not resume the struggle ". These words mean the denunciation of individuals who took part in French resistance movements, and of individuals who declined to serve the enemy or quisling authorities. Two more types of " facts " or acts are punishable if reported to the authorities or organizations mentioned: acts punishable under the laws of the French quisling administration, when such laws were not confirmed by the French Government after the war ; and acts for which an amnesty had been granted or which had entailed punishments quashed by higher courts.

It will be noticed that the first type of facts or acts included in the notion of denunciation would have applied to the case of Ferrarese, who denounced individuals engaged " in the struggle against Germany ". Neither the Prosecution, however, nor the Tribunal made use of the said Ordinance, apparently because the other counts, relating to the offences resulting from the accused's denunciations, were sufficient to result in conviction.

The comparative analysis of the above decision of the United Nations War Crimes Commission and of the French Ordinance of 31st January, 1944, show two different methods of dealing with cases of denunciation. The course taken by the United Nations War Crimes Commission was to absorb denunciation in the general concept of complicity, and to punish the offences resulting from denunciation, but not denunciation in itself. According to the course taken by the French legislation, however, denunciation was separated from subsequent offences in which the informer becomes or may become an accomplice according to the War Crimes Commission's decision, and was treated as an offence of its own.

3. ATTEMPT TO COMMIT ILLEGAL ARREST

It is convenient to close this analysis of the trials concerning illegal arrests and detentions with yet another trial of interest. It serves as evidence and illustration that not only actual illegal arrests, but attempts to commit such arrest are also treated as a war crime.

In the trial in question, the accused, Stucker, was a Nazi party official serving in the " Kreisleitung " of Thann, district of the French Upper Rhine.(1) As a zealous member of the Nazi party, he made numerous suggestions to the competent German authorities as to who of the inhabitants, in his opinion, should be arrested and/or removed from the area. Thus, in February, 1943, he recommended to the S.D., a branch of the Gestapo, the arrest and deportation of Edouard Kiffer and all members of his family, which he reported as politically undesirable. No action was taken by the S.D. in the matter.

The accused was found guilty of " attempt to arrest, detain or restrain " the inhabitants concerned, under the terms of Article 341 and Article 2 of the Penal Code.

Article 2 contains a general provision on the attempt to commit a crime, which reads :

> " Any attempt to commit a crime which is displayed by a commencement of execution, when it is suspended or has failed to achieve its object on account of circumstances independent of the will of the perpetrator is regarded as the crime itself."

The Tribunal established that the accused had attempted to commit illegal arrest and detention " by suggesting to the S.D. the deportation " of Kiffer and his family " as detainees or internees ", whilst " no sentence in accordance with the laws and customs of war had been pronounced " against the would-be victims. It also established that the attempt was " displayed by a commencement of execution ", and that it was " suspended or failed to achieve its effect on account of circumstances independent of the accused's will " in that no action was taken by the competent authorities. The accused was condemned to imprisonment for two years.

It will be noted that, in the above formulæ, the Court referred both to Article 2 of the Penal Code and to Article 2 paragraph 5 of the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes, previously mentioned. The latter punishes the illegal deportation of persons " detained or interned ".

The above judgment is thus an instance of how general principles of penal law contribute, through municipal law and decisions of the courts, towards the building up of an international penal law.

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(1) Judgment of the Permanent Military Tribunal at Metz, 25th November, 1947.

CASE NO. 41

TRIAL OF JEAN-PIERRE LEX

PERMANENT MILITARY TRIBUNAL AT NANCY
CONCLUDED 13TH MAY, 1946

Injury to the external security of the State and the Laws and Customs of war.

A. OUTLINE OF THE PROCEEDINGS

The accused, Jean-Pierre Lex, a German citizen residing in Peltre, was charged with having instigated, during the occupation of France, between July, 1940, and April, 1944, the deportation of 17 French families, and to have looted their property.

It was shown that the accused had resided in Peltre since 1932. During the war of 1939–1945, he had worked as assistant to Ulrich, another German who had served as secretary of the Town Hall at Peltre. Due to his long residence, Lex had an intimate knowledge of the local inhabitants. He reported to the German authorities names of those using the French language, and accused many others of conducting anti-German propaganda. As a result, 17 families were deported to Germany. The accused was entrusted with arranging their departures from Peltre.

The charge of pillage of the property of the deportees was dismissed on account of lack of evidence.

The Tribunal found the accused guilty of having " in time of war and being a German, exposed Frenchmen to reprisals by means of acts not authorized by the (French) Government, namely by denouncing them to the German authorities." The accused was convicted to solitary confinement for five years, and to the confiscation of all his property.

B. NOTES ON THE NATURE OF THE OFFENCE

The accused was found guilty of the above offence under the terms of Art. 79 para. 2 of the French Penal Code.

The Article deals with the crime of " injury to the external security of the State " (*atteinte à la sûreté extérieure de l'Etat*). The following five types of cases fall within this notion :

(1) Hostile acts, not approved by the French Government, by which France is exposed to a declaration of war ;

(2) Acts not approved by the French Government, by which French citizens are exposed to endure reprisals ;

(3) Enlisting soldiers in time of peace on behalf of a foreign Power, in French territory ;[1]

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[1] On this subject see, in Vol. III of this series, the *Trial of Robert Wagner and Six Others.*

(4) Maintaining in time of war, without permission of the French Government, correspondence or relations with subjects or agents of an enemy Power ;

(5) Undertaking in time of war, in disregard of prohibitions, acts of commerce with subjects or agents of an enemy Power.(1)

Both French citizens and foreigners are made liable to punishment.

The accused was found guilty under item (2) above, in that he denounced French citizens, caused their deportation, and thereby " exposed " them to " reprisals ".

It should be observed that the term " reprisals " in Art. 79 of the French Penal Code, is not used in the sense of international law, and consequently does not refer to acts permissible under the laws and customs of war. It refers, on the contrary, to persecutions of the inhabitants of occupied territory, whether or not these are conducted as reprisals in the proper sense.(2)

It would thus appear that, by convicting the accused for " injury to the external security of the State ", in that French citizens were " exposed to endure reprisals ", the Tribunal passed judgment purely on the basis of French national law. Evidence to this effect can be found in that, unlike other French trials already reported upon in this Series, the Court did not make reference to the Ordinance of 28th August, 1944, dealing with the punishment of war crimes.

It should, however, be stressed that the acts for which the accused was condemned are also punishable under the laws and customs of war. The accused took part in the deportation of inhabitants of an occupied territory, and such deportations are recognized as a war crime. They are expressly included in the definition of war crimes in Art. 6 (b) of the Nuremberg Charter, as well as in Art. II, 1 (b) of Law No. 10 of the Allied Control Council for Germany. They were also recognized as such by the United Nations War Crimes Commission in connection with numerous cases reported to it by member governments, in dealing with which the Commission had in mind the Preamble of the 4th Hague Convention concerning the Laws and Customs of War on Land, which covers violations not explicitly prohibited in the various provisions of the Convention.(3)

In the circumstances of the case, the accused's complicity in deportations was at the same time the result of the fact that he had committed acts of denunciation. As has already been reported in connection with another trial,(4) denunciation can either be regarded as an offence in itself, or else treated in conjunction with the concept of complicity.

It thus appears that, in either case, the accused was in fact guilty of a war crime, in addition to having violated a provision of French municipal law.

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(1) Several other acts are also regarded as " injury to the external security of the State ". They are dealt with in Arts. 81-82 of the Penal Code.

(2) The problem of reprisals is to receive further treatment in a later volume of this series.

(3) See also pp. 53–58.

(4) See *Trial of Gustav Becker, et al*, on pp. 71–72 above.

CASE NO. 42

TRIAL OF HEINRICH GERIKE AND SEVEN OTHERS

(THE VELPKE CHILDREN'S HOME CASE)
BRITISH MILITARY COURT, BRUNSWICK
20TH MARCH–3RD APRIL, 1946

A. OUTLINE OF THE PROCEEDINGS

The accused, Heinrich Gerike, Georg Hessling, Werner Noth, Hermann Muller, Gustav Claus, Doctor Richard Demmerich, Fritz Flint and Frau Valentina Bilien, were charged with committing a war crime " in that they at Velpke, Germany, between the months of May and December, 1944, in violation of the laws and usages of war, were concerned in the killing by wilful neglect of a number of children, Polish Nationals."

It was established that a home for infant children of Polish female workers was established in Velpke in about May, 1944, that the children were to be compulsorily separated from their parents, and that the purpose of the separation was to advance the work on the nearby farms in order to maintain the supply of food in the year 1944. In view of the protests to the effect that the tending of their babies by Polish women was hindering the production of food on the farms where they worked, the accused Gerike, then Kreisleiter of Helmstedt, was ordered by his Gauleiter to erect a home where the children could be kept after being taken away from their mothers. Gerike chose, though according to his account only as a temporary expedient, a corrugated iron hut, without running water, light, telephone or facilities for dealing with sickness. As a matron for the home, the Labour Officer sent, against her will, the accused Valentina Bilien, who stated in Court that she had been married to a Russian, but that her father was German and that she came to Germany in February, 1944. She had formerly been a school teacher in Russia and had had no previous experience of running a clinic for infant children. She was at first provided with no staff, no medical equipment and no records except for a register of incoming children. Gerike ordered her not to return the children to their mothers and not to send any to hospital. She was instructed to " call in a doctor if necessary. " She later had the assistance of four helpers, Polish and Russian girls, but conditions were largely the same when, six months later, possession of the premises was required by the Volkswagen makers.

Gerike, though he knew of the death-rate, never visited the home or interviewed Frau Bilien after the initial selection of the barracks. Nor did he engage the services of a trained nurse who lived in the village of Velpke.

Frau Bilien claimed that she was ordered by the Labour Office, and then by Gerike, to take over her post at the home. The evidence showed that the premises were infested with flies and the sick children were not adequately separated from the rest. The infants' clothing was not kept clean, and there were no scales for weighing them. The matron went away for her meals and to do shopping, and was never in the home at night, though the helpers stayed there. During six months, more than 80 Polish infants died. The

evidence of the village registrar showed that the three most frequent causes of death as certified by the doctors were general weakness, dysentery, and what they called catarrh of the intestines.

As administrator of the home, Gerike appointed the accused Hessling, who was also without previous experience of operating a children's clinic. Hessling called at the home at least once a month, and knew of the death-rate. Frau Bilien testified that she made many complaints to him, but that nothing was achieved except the raising of the entry age for children, which was previously eight to ten days after confinement, to four to six weeks thereafter. Hessling claimed that his only duty was to arrange the finances, but Gerike denied this. One witness testified that Frau Bilien, on finding that some of the children were dying because they needed mothers' milk, sent some back to their mothers, but that Hessling, on discovering her action, forbade such a course.

Two doctors paid rare visits to the home before September, 1944, when the accused Dr. Demmerick, though without official instructions, started to visit the home and to tend sick infants. Later in the period from September to December, 1944, however, Demmerick, falling in with the matron's suggestion, only tended such of the children as Frau Bilien brought to him, and only visited the home to sign death certificates. Demmerick claimed that, due to his large practice, he could find no time to write any letters of protest to persons in authority, or, in the later period, to visit the babies.

The accused Muller was an Ortsgruppenleiter, the leading Nazi in the village. He had seen the home and disapproved of it, but Gerike had told him that it was not his responsibility. Nevertheless, he once telephoned Gerike, told him of the frequent deaths and received an assurance that something would be done to improve matters. After that he appears not to have pursued the matter any further.

The accused Noth was Burgomeister in the village, and held no official position in the Nazi party, though he was a member thereof. He knew of the state of affairs at the home, advised against its establishment and wanted to see it removed.

The accused Claus, a farmer of Velpke, was found not guilty immediately after giving his evidence. He admitted that he sent at least two children to the home against the parents' will, but it was not proved that he knew of the neglect shown in the institution. The accused Flint died during the course of the trial.

Gerike, Hessling, Demmerick and Frau Bilien were found guilty. Muller and Noth were found not guilty.

Subject to confirmation by superior military authority, Valentina Bilien was sentenced to fifteen years' imprisonment, Dr. Richard Demmerick to ten years' imprisonment, and Georg Hessling and Heinrich Gerike to death by hanging. The findings and sentences were confirmed.

B. NOTES ON THE NATURE OF THE OFFENCE

The war crime of which the accused were found guilty was of a very unusual type and would repay a little examination. In the absence of a Judge Advocate's summing up, the arguments of Counsel can most profitably be examined in making an attempt to throw light on the legal nature of the offence.

The Prosecutor referred to Article 46 of the Regulations annexed to the Hague Convention No. IV of 1907, which forms part of Section III (*Military Authority over the Territory of the Hostile State*) and which provides that :

> " *Art.* 46. Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected. Private property may not be confiscated."

Counsel pointed out that under international law it was forbidden in time of war to kill the innocent and defenceless population of any country overrun, " either in their own country or in the country of the occupying power ". He added that it was unlawful for an occupying power to deport slave labour from the occupied country to its own territory, in the first place.

Elaborating his legal argument further, the Prosecutor quoted a number of passages from Archbold's *Pleading, Evidence and Practice in Criminal Cases* which expounded certain aspects of the English law of murder and criminal negligence. These were as follows :

> " If a man, however, does any other act, of which the probable consequence may be and eventually is death, such killing may be murder, although no stroke were struck by himself ; as was the case of the gaoler, who causes the death of a prisoner by imprisoning him in unwholesome air ; of the unnatural son, who exposed his sick father to the air against his will, by reason whereof he died ; of the harlot, who laid her child in an orchard, where a kite struck it and killed it ; of the mother, who hid her child in a pig-sty, where it was devoured ; and of the parish officers, who moved a child from parish to parish till it died from want of care and sustenance."(1)

> " Neglect of the helpless : Premeditated neglect or ill-treatment by persons having custody, charge, or control of helpless persons, whether children, imbeciles, or lunatics, or sick or aged, by deliberate omission to supply them with necessary food, etc., if attended with fatal results, may be murder ; and if the same result flows from gross neglect in such a case, the offender is guilty of manslaughter."(2)

> " If a grown-up person chooses to undertake the charge of a human creature helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without wicked negligence ; and if a person who has chosen to take charge of a helpless creature lets it die by gross negligence, that person is guilty of manslaughter. Mere negligence will not do ; there must be negligence so great as to satisfy a jury that the prisoner was reckless and careless whether the creature died or not. ' Reckless ' is a more accurate epithet to be applied

(1) Archbold, *Pleading Evidence and Practice in Criminal Cases*, 31st Edition, p. 861.
(2) *Ibid*, p. 887.

to the negligence required than ' wicked '. If a person has the custody of another who is helpless, and leaves that other with insufficient food or medical attendance, and so causes his death, he is criminally responsible."(1)

" Where death results in consequence of a negligent act, it would seem that to create criminal responsibility the degree of negligence must be so gross as to amount to recklessness. Mere inadvertence, while it might create civil liability, would not suffice to create criminal liability." The next paragraph reads: " In explaining to juries the test which they should apply to determine whether the negligence in the particular case amounted or did not amount to a crime, Judges have used many epithets such as ' culpable ', ' criminal ', ' gross ', ' wicked ', ' clear ', ' complete '. But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability, the facts must be such that, in the opinion of the jury, the negligence of the prisoner went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."(2)

In general it is recognized that the distinction made in English Law between murder and manslaughter is not relevant in trials of war criminals,(3) and the Prosecutor did not in fact indicate on which of the above statements he chose to place most reliance in the present case.

The Prosecutor placed particular stress on the claim that once the child came from the farm where the female Polish worker had it and passed into the home, then all the obligations of motherhood, and the tests laid down by those passages, became applicable to Gerike, Hessling and Bilien. From the moment Gerike established the home for infant children of female Polish workers, whose children were to be taken away from their parents if necessary by force, " the Home became a Party affair, an NSDAP institution, entrusted by the Gauleiter to the control, administration and responsibility of the Kreisleitung of Helmstedt. . . . As long as the children of these workers remained in the custody of their mothers, albeit they were working on the farms, then if harm or hap should come to those children, then it may well have been the fault of the Polish mother, but once you have removed those children by force and against the will of the mother into that Home which is run by the Party from Kreis downwards, then and there the Party at the Kreisleitung takes over the parental responsibility of those infant children, and with that responsibility they take over naturally a whole burden of complicated duties relating to every branch of ordinary child welfare ". Counsel claimed that the case of infant children had from time immemorial been " the act and attribute of a civilized community ". In dealing with Frau Bilien he pointed out that: " Although she has said that what she did she did under order, she seems to have had very little idea of service and devotion and sacrifice to duty. If you undertake a task of skill then in law you are called upon to show the skill of the task that you have undertaken."

(1) *Ibid*, p. 863.
(2) *Ibid*, p. 882.
(3) See for instance Vol. I, pp. 91-92, and p. 81 of the present Volume.

A case which turned mainly if not entirely on allegations, not of acts, but of omissions necessarily raised difficult questions as to what standard of care each accused could reasonably have been expected to observe. The Prosecution claimed that the accused, each " according to his function ", had been guilty of such a gross and criminal disregard of their duties towards these defenceless Polish infants as to show a total disregard as to whether they lived or whether they died, and were therefore guilty under the charge. For various accused it was argued that they had done all that they could in the difficult position as regards accommodation, transport, suitable labour and medical services which resulted from the war. For Noth it was claimed that he had no power to alter a state of affairs which was actually under the control of the Nazi party.

The Court refused to support the allegation of the Prosecution in all cases. For instance, the Prosecution, while pointing out that Muller had, unlike Demmerick, Hessling and Gerike, never assumed the care of the children, submitted that Muller was neglectful in his functions as chief Nazi in the village, and that he thus " did contribute to the whole miserable affair and allowed it to go forward." Ortsgruppenleiter Muller was nevertheless acquitted. So also was the Burgomeister, Noth, who, according to the Prosecution's submission, turned a blind eye to the home, while he and the Ortsgruppenleiter together could have done much to relieve the conditions and death-rate therein. On the other hand, the Court inflicted a term of ten years' imprisonment on Dr. Demmerick, who had never received official instructions to tend the babies but who, according to the Prosecution, had by his acts " assumed the care of those children in place of their mothers ".

It is to be noted Article 46 of the Hague Convention No. IV of 1907, which was drafted at a time when deportations for forced labour on the scale carried out by Nazi Germany could not have been contemplated, strictly speaking applies only to the behaviour of the occupying Power *within occupied territory*. Nevertheless, it is clear that the general rule laid down therein must be followed also in respect of inhabitants of occupied territory who have been sent into the country of the occupant for forced labour, as had the mothers of the children who were sent to the Velpke home, and to children born to them while in captivity. It was pointed out by the Prosecutor that such deportation was itself contrary to international law, as was stated in Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition, on pp. 345–6, in the following passage :

> " . . . there is no right to deport inhabitants to the country of the occupant, for the purpose of compelling them to work there. When during the World War the Germans deported to Germany several thousands of Belgian and French men and women, and compelled them to work there, the whole civilized world stigmatized this cruel practice as an outrage."

It could have been argued by the Defence in the present case that the offence of deportation was committed by persons other than the accused ; nevertheless, it seems reasonable to assume that the inhabitants of an occupied territory keep their rights under international law when forced to leave their own country, even though this is not expressly provided in the Hague Convention. Indeed, the Tribunal which conducted the *Justice*

Trial stated clearly that the transfer of " Night and Fog " prisoners from occupied territories to Germany did not cleanse the " Night and Fog " Plan of its iniquity " or render it legal in any respect ".(1)

Similarly, the Judge Advocate acting in the Trial of Georg Tyrolt and others by a British Military Court, Helmstedt, 20th May–24th June, 1946, said of the victims of the offences charged in that case : " Quite obviously if it is wrong to show lack of respect to their family life and individual life in their own country, you cannot get out of that obligation simply by taking them to your country and then ill-treating them there."

The last-mentioned trial is indeed a useful parallel to the *Velpke Children's Home Case*. The charge against the accused was one of " Committing a War Crime in that they at Wolfsburg, and Ruehen, Germany, between the months of April, 1943, and April, 1945, in violation of the laws and usages of war, were concerned in killing by wilful neglect a number of children of Polish and Russian nationals." The general facts of the case were also very similar to those in the trial of Gerike and others and again concerned the operation of a children's home. In his closing address the Prosecutor quoted the first three passages from Archbold which are cited above(2) and added :

> " In a war crime we do not have to distinguish in charging a person between murder and manslaughter. To kill infant children who are admittedly helpless and in their care either by premeditated neglect or by wicked neglect is equally a war crime whether it be murder or manslaughter, but it is for you to decide in the case of each accused which degree is applicable to each accused."

The Judge Advocate referred to the Prosecutor's words as follows :

> " Again, I have no quarrel whatever with the authorities that Major Draper cited to you in support of his contention that these accused, if they did what is alleged against them, come within the doctrines of our English law regarding the standard of behaviour that must be expected of persons who undertake the care of young children. . . . I agree with those submissions in law that he has made to you, and my advice to you is that they are sound and that they should govern your decisions when you come to consider the verdict. Either of those standards would include the wording of the charge in this case, namely ' concerned in killing by wilful neglect ' and the final question of which of those two standards any one of those accused neglected to observe, if any of them did, can only affect, in my opinion, your sentence at a later stage and not your verdict."

Death sentences were passed on the accused Dr. Korbel, who had been responsible for the medical care and health of the children, and on Ella Schmidt, a nurse in whose charge they were placed. A sentence of five years' imprisonment was passed on Liesel Bacher, a nurse who also had charge of the infants for a period. Seven others accused were found not guilty. The findings and sentences were confirmed.

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(1) See p. 56 of Vol. VI of this series. Regarding deportation, see also p. 75, and pp. 53–61, of the present volume.

(2) See p. 78.

ANNEX

POLISH LAW CONCERNING TRIALS OF WAR CRIMINALS

I. SUBSTANTIVE LAW

1. THE BASIC PROVISIONS

The first legal measures concerning the responsibility for crimes committed in connection with the war, i.e., for war crimes, war-treason and collaboration with the enemy, were enacted in Poland at the time when the war-battles between the Russian and German forces were at their peak, and only a small part of the Polish territory had been liberated from the enemy. These measures were contained in a Decree promulgated by the Polish Committee of National Liberation on the 31st August, 1944, *concerning the punishment of Fascist-Hitlerite criminals guilty of murder and ill-treatment of the civilian population and of prisoners of war, and the punishment of traitors to the Polish nation.* (Official Gazette No. 4, of 13th September, 1944.)(1)

This Decree, which was of a general nature provided, in a few articles, measures for the punishment of war crimes, and of offences against the civilian population in contravention of international law committed by Polish nationals and aliens. The offences which came within the scope of this Decree were the following:

(*a*) murder of civilians and of prisoners of war, their ill-treatment and persecution ;

(*b*) arrest and deportation of persons wanted or persecuted by the occupying authorities for whatever reason it may be, save their prosecution for common law crimes, including such acts committed against persons residing on Polish territory irrespective of their nationality or race ;

(*c*) blackmail with intent to profit under threat of arrest or handing over to the occupying authority.

For all crimes mentioned under (*a*) and (*b*) the death penalty was provided, loss of public and civic rights, forfeiture of property being incidental to it ; for crimes indicated under (*c*)—imprisonment up to 15 years or for life.

According to further provisions of this Decree, service with the occupying authority, obedience to superior orders or compulsion did not exempt from responsibility. The latter rested also upon persons who attempted, abetted or assisted in the commission of the crimes.

The jurisdiction over crimes mentioned above was exercised by Special Criminal Courts consisting of one professional judge and two lay-judges. The judgments of the Courts were final ; the procedure applied was, with some exceptions, that laid down in the Code of Criminal Procedure. The

(1) At an earlier stage of the war the Polish Government in London enacted on 30th March, 1943, a Decree *concerning the responsibility for war crimes* (Official Gazette, No. 3). This Decree, which could be regarded as a comparatively good codification of offences committed " in contravention of International Law ", was not, however, put into operation after the liberation of Poland and is not applicable to war crimes trials held by Polish courts.

defendant had to appear with counsel of his own choice or one appointed *ex officio* by the Court (Decree of 12th September, 1944, concerning Special Criminal Courts, Official Gazette, No. 4).

It is to be noted that the provisions of the above Decree had in many respects a restricted application, such as, for instance, that in regard to some of the acts they were applicable only to crimes and offences on Polish territory. By the subsequent Decrees of 16th February, 1945 (Official Gazette, No. 7) and of 10th December, 1946 (Official Gazette, No. 69)(1) certain important changes were made in the text of the Decree of 31st August, 1944, which have finally been embodied in the consolidated text of that Decree contained in the Schedule to the Proclamation of the Minister of Justice dated 11th December, 1946 (Official Gazette, No. 69, item 377). The provisions of this Decree are now applicable to criminal acts committed between 1st September, 1939 and 9th May, 1945.

At the same time the Special Criminal Courts have been abolished by the Decree of 17th October, 1946 (Official Gazette, No. 59), and the jurisdiction over all crimes committed in connection with the war, except those for the trial of which the Supreme National Tribunal was set up, has been entrusted to ordinary criminal courts.

The Supreme National Tribunal was established by the Decree of 22nd January, 1946 (Official Gazette, No. 5), *inter alia*, for the trial of persons who, in accordance with the Moscow Declaration of 1st November, 1943, will be surrendered to the Polish prosecuting authorities for crimes committed on Polish territory during enemy occupation. By the Decree of 17th October, 1946 (Official Gazette, No. 59), the jurisdiction of this Tribunal has been extended to all war criminals who are handed over to Poland for trial, and over all war crimes irrespective of the place of their commission. Finally, certain changes concerning the procedure and evidence have been made by the Decree of 11th April, 1947 (Official Gazette, No. 32).

It should also be noted that on 25th September, 1945, the Polish Government expressed its adherence to the London Agreement of 8th August, 1945, for the Prosecution and Punishment of the Major War Criminals of the European Axis.(2) The Proclamation of the Government concerning this adherence has been ratified by the Polish Parliament on 25th June, 1947, and the texts of the Agreement and the Charter of the International Military Tribunal published in the Official Gazette on 14th October, 1947 (No. 63). As to the legal effect of the London Agreement on the Polish system of criminal law, it should be pointed out at once that in accordance with the view expressed formally by Polish judicial authorities and with the prevailing opinion of Polish legal writers, this Agreement is now binding in Poland as a part of the law of the land, as is the case with all international treaties and conventions concluded and/or ratified by Poland, provided they have been promulgated in the Official Gazette.

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(1) These Decrees have been enacted by the Council of Ministers of the Polish Provisional Government, and approved by the National State Council.

(2) H.M. Stationery Office, Miscellaneous No. 10 (1945), Cmd. 6668.

2. OFFENCES AND THEIR PUNISHMENT

Articles 1 and 2 of the consolidated text of the Decree of 1944 read as follows :

Article 1. " Any person who, assisting the authorities of the German State or of a State allied with it :

(1) took part in committing acts of murder against the civilian population, members of the armed forces or prisoners of war ; or

(2) by giving information or detaining, acted to the detriment of persons wanted or persecuted by the said authorities on political, national, religious or racial grounds—is liable to the death penalty."

Article 2. " Any person who, assisting the authorities of the German State, or of a State allied with it, acted in any other manner or in any other circumstances than those indicated in Article 1 to the detriment of the Polish State, of a Polish corporate body, or of civilians, members of the armed forces and prisoners of war—is liable to imprisonment for a period of not less than three years, or for life, or to the death penalty."

The provisions of these two articles, as is also the case in regard to other provisions of the Decree, should be read in conjunction with the terms of the Criminal Code of 1932 (Official Gazette, No. 60), but only in so far as this Decree which is a *lex posterior specialis* does not provide otherwise (Article 92 of the Criminal Code).(1)

Inasmuch as the jurisdiction of Polish Courts over crimes committed by foreigners and stateless persons is concerned, the following provisions of the Civil Criminal Code should be quoted :

Article 3, *Para.* 1. " Polish criminal law is applicable to *all persons* who committed a crime on the territory of the Polish State or on board a Polish sea or air/craft. As territory of the State are also considered the inland and coastal waters as well as the air over such territory."

Article 5. " The Polish Criminal Law is applicable to foreigners who committed a crime abroad directed against the welfare or interests of the Polish State, a Polish citizen or a Polish corporate body."

Article 6, *Para.* 1. " Criminal responsibility for an act committed abroad is conditioned upon whether the act is considered as criminal by the law in force in the territory where it has been committed."

Article 8. " Irrespective of the law in force on the territory where the crime has been committed and of the citizenship of the offender, Polish Criminal Law is applicable to persons who committed the following crimes abroad :

(*a*) a crime against internal or external security of the Polish State,

(*b*) a crime against Polish authorities or Polish officials,

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(1) Article 92 reads :
" The provisions of the general part of the present Code are applicable to crimes and offences, as well as to penalties and protective measures envisaged in other laws, if the latter do not provide otherwise."

(*b*) false testimony whilst giving evidence to Polish authorities."

Article 9. " Irrespective of the law in force in the territory where the crime has been committed, Polish Criminal Law is applicable to Polish citizens and foreigners, whom it was decided not to extradite, in case they committed one of the following crimes abroad :

(*a*) piracy ;

(*b*) counterfeiting of currency, public securities and bank notes ;

(*c*) slave traffic ;

(*d*) traffic in women and children ;

(*e*) committing an act which can cause general danger with intent to cause such a danger ;

(*f*) traffic in drugs ;

(*g*) traffic in pornographic publications ;

(*h*) *any other crime envisaged in international agreements concluded by the Polish State.*"[1]

Article 10, *Para.* 1. " Polish Criminal Law is applicable to foreigners who committed a crime abroad not enumerated in Articles 5, 8 and 9, if the offender happens to be on the territory of the Polish State and it was decided not to extradite him, provided the conditions stipulated in Articles 6 and 7 arise.

Para. 2. Prosecution is initiated at the instance of the Minister of Justice."

There is, of course, no need to elaborate here the fact that Polish Criminal Law is applicable to all Polish citizens who committed crimes abroad (Article 4).[2] However, it is to be pointed out at once that of the provisions of the Criminal Code quoted above, only Article 6 has not been made applicable to criminal acts defined in the Decree of 1944 (Article 8 of the Decree). And this for obvious reasons. It is true that the majority of the crimes enumerated in this Decree were recognized as criminal acts also by the law of the German State, and of the States allied with it, but in the circumstances in which they have been committed and in view of the interests they served, in most of the cases they would not have been considered by the authorities of those States as illegal and punishable.

Article 1 of the Decree should be interpreted to the effect that the responsibility lies not only with persons who committed the criminal acts, but also with those who were accomplices to, or attempted and abetted, their commission. On the other hand, a restrictive interpretation is to be placed upon para (2) of this article. This follows from Article 6 of the Decree which provides :

" To inform against or to hand over to the German State, or to a State allied with it, persons wanted for a common crime is not punishable, provided the person responsible for giving information or handing over acted in the greater public or private interest."

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(1) Italics in Art. 3 and 9 introduced.

(2) It is also applicable to persons who since the commission of a crime have changed their Polish nationality, or who after the criminal fact acquired Polish citizenship. (Article 4, para. 2.)

From the wording of Articles 1 and 2, and in particular from the words " civilian population ", " civilians " and " persons " it appears that these provisions envisage responsibility for acts which have been committed not only against Polish citizens, but also against all other persons irrespective of their nationality, including German nationals who were wanted or persecuted on political, religious or racial grounds.

It will be observed that Article 2 of the Decree has a very wide application as within its provision would come all acts considered as criminal by municipal and international law, other than those enumerated in Paras. (1) and (2) of Article 1.

As to the punishment envisaged in Article 1, it is to be noted that this provision is the only one of all the Polish legislative acts, now in force, which gives the courts no other choice but to inflict the death penalty.

While Articles 1 and 2 of the Decree are concerned with crimes committed in the interest of the enemy states by " assisting " the authorities of those states in the commission of the crimes, Article 3 deals with criminal acts which are free from such qualification. It reads :

> *Article* 3. " Any person who, taking advantage of the conditions created by the war, compelled persons to act under threat of persecution by the authorities of the German State, or by a State allied with it, or acted in any other manner to the detriment of persons wanted or persecuted by the said authorities—is liable to imprisonment for a period of not less than three years, or for life."

From the above it is clear that contrary to the position created by the law as contained in Articles 1 and 2, within the provision of Article 3 would come mostly, but not exclusively, criminal acts committed by Polish citizens and on Polish territory. As regards the " conditions created by the war ", two such conditions are to be taken into consideration. One is of a general nature and pertains to all Polish citizens, namely, the lack of legal protection of the national authorities and, partly, lack of the law itself inasmuch as it had been repealed by the German authorities, as well as the virtual elimination of the State as a conception of the community organized according to the law of the land ; the second condition relates to the factual situation in which the victims of the criminal acts have found themselves according to the circumstances of each individual case.

3. MEMBERSHIP OF CRIMINAL ORGANIZATIONS

In this respect Article 4 of the Decree of 1944 contains the following provisions :

> " *Para.* 1. Any person who was a member of a criminal organization established or recognized by the authorities of the German State or of a State allied with it, or by a political association which acted in the interest of the German State or a State allied with it—is liable to imprisonment for a period of not less than three years, or for life, or to the death penalty."
>
> " *Para.* 2. A criminal organization in the meaning of para. 1 is a group or organization :

(*a*) which has as its aims the commission of crimes against peace, war crimes or crimes against humanity ; or

(*b*) which while having a different aim, tries to attain it through the commission of crimes mentioned under (*a*)."

" *Para.* 3. Membership of the following organizations especially is considered criminal :

(*a*) the German National Socialist Workers' Party (National Sozialistische Deutsche Arbeiter Partei—NSDAP) as regards all leading positions,

(*b*) the Security Detachments (Schutzstaffeln-SS),

(*c*) the State Secret Police (Geheime Staats-Polizei—Gestapo),

(*d*) the Security Service (Sicherheits Dienst—SD)."

The above provisions have been introduced in the consolidated text of the Decree in December, 1946, in order to bring Polish municipal law into line with the developments which, in the meantime, have taken place in international criminal law, in particular, in connection with the London Agreement of 8th August, 1945, and the Judgment of the Nuremberg Tribunal. Therefore, in interpreting the conceptions and notions referred to in Article 4, one would have recourse to these international documents.

From the rule laid down by Article 10 of the Nuremberg Charter(1) it follows that since the ratification of the London Agreement by Poland, whenever a person is tried on a charge of membership in a group or organization the criminal character of which was under examination of the Nuremberg Tribunal, the Polish Courts are in law bound by the findings of the Tribunal and cannot re-examine the question of the criminal character of the organization dealt with in the Judgment. Thus, the findings of the Tribunal create for the Polish court a *præsumptio iuris ac de iure* which cannot be invalidated.

On the other hand, it is clear from the law as laid down in Para. 2 of Article 4 of the Decree that Polish courts are not bound by the fact that certain other groups or organizations have not been indicted and adjudicated as criminal within the meaning of the Charter. In these cases the Polish court may declare such groups or organizations to be criminal within the Polish jurisdiction. Accordingly, the practice of Polish courts has declared to be criminal some other Nazi groups or organizations which displayed particular zeal in occupied Poland, such as the leadership of the German civil administration in the so-called General Government, members of the concentration camp staff at Auschwitz, officials of the administration of the Lodz ghetto, etc. This contention and practice is also based on the fact that para. 3 of Article 4 is not exhaustive and the organizations mentioned therein are enumerated only *exempli causa*.

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(1) Article 10 of the Charter reads :

" In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

4. NECESSITY AND SUPERIOR ORDERS

The Decree contains in para. 1 of Article 5 the following provision:

" The fact that an act or omission was caused by a threat or order, or arose out of obligation under municipal law, does not exempt from criminal responsibility."

In accordance with para. 2 the Court in such a case may mitigate the sentence " taking into consideration the circumstances of the perpetrator and of the deed ". However, if the Court would decide to mitigate the sentence to the extent as to convict the accused to imprisonment not exceeding two years, the court will then not be in the position to avail itself of the power given to it by Article 61 of the Criminal Code, which provides that in such cases the Court may suspend, in certain circumstances, the execution of the sentence for a period from 2–5 years. This follows from Article 8 of the Decree which provides that Article 61 of the Criminal Code is not applicable to criminal acts defined in the Decree.

5. ADDITIONAL PENALTIES

Apart from the penalties prescribed by Articles 1–4 the Court is under obligation, in accordance with Article 7 of the Decree, to pronounce the following additional penalties in all instances when sentence is passed for a crime defined in this Decree:

" (*a*) loss of public and civic rights,

(*b*) forfeiture of all property of the sentenced person. The ownership of the forfeited property is to be taken over by the Treasury, with the proviso that the rights of third persons are to be safeguarded to an extent not exceeding the value of the forfeited property; the rights, however, arising from intestate succession, from provisions made in a will or from a donation made after the crime has been committed are not to be taken into account; the forfeiture does not apply to objects excluded by law from seizure; all legal acts made with the purpose of saving the property from forfeiture are null and void."

6. POLISH LEGAL APPROACH TO WAR CRIMES

From the foregoing it appears that the Polish attitude towards the treatment of war criminals follows the general continental practice that before punishment is inflicted, an individual offender must be shown to have offended against some specific provision of Polish municipal law.[1] An additional characteristic of the Polish system is that the violation of any set of international rules or the laws and customs or war need not be shown.

Consequently, the provisions of the Decree dealing with crimes committed in connection with the war as described in the preceding sections do not define the terms " war crime " and " war criminal ", but from the spirit of this law it seems to follow that the offences which have been made punishable are such infractions of Polish law as are not justified by the laws and customs of war.

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[1] *Cf.* Vol. III of this series, pp. 81-83.

The scope of the term *war crime* which can be derived from the Polish special legislation seems, however, to be wide enough to include within this notion any violation of the laws and usages of war committed during the late war. This follows, in particular, from the wording of Article 2 of the Decree of 1944, by which any act other than those enumerated in Article 1 and committed to the detriment of the Polish State, Polish corporate body or of any individual persons, has been made punishable. This follows also, as will be shown later, from the scope of the jurisdiction which has been given to the Polish Supreme National Tribunal. The latter has the power to deal with all crimes committed by persons who, according to the Moscow Declaration, are handed over to Poland for trial.

Neither has the Polish special legislation, in principle, separated the acts constituting *crimes against humanity* from the group of offences coming within the notion of war crimes proper. This has only partly been done in para. 2 of Article 1, in regard to some specific offences arising out of giving information on, or detaining of, persons wanted or persecuted on political, racial or religious grounds.

Thus, all acts which because of the particular circumstances, personal or factual, connected with their commission come within the notion of crimes against humanity, have been absorbed by the general wording of Articles 1 to 3 and with only a few exceptions constitute simultaneously war crimes in the narrower sense. They are, of course, restricted to crimes committed during the war in view of the fact that the application of the law as contained in the Decree has been limited to acts committed between 1st September, 1939, and 9th May, 1945. In so far as victims of enemy nationality are concerned, they are further restricted to crimes committed on Polish territory in view of what has been said already in regard to the jurisdiction of Polish courts.(1)

At the same time, however, the notion of crimes against humanity which could be derived from the provisions of the Polish war crimes legislation, seems to be much wider than that implied in the Charters of the International Military Tribunals at Nuremberg and Tokyo. When interpreting the meaning of the relevant provisions of these documents, it has always been assumed that a large body of victims is essential in order to classify the acts as crimes against humanity.(2) The analysis already made in Section 2, seems to indicate that according to Polish law this particular characteristic, which constitutes one of the *differentia specifica* between crimes against humanity and war crimes proper is not essential, although not unimportant. That is why a crime against humanity can also be perpetrated when the offence has been committed against an individual person. It would seem only essential in such cases that the offence was committed because the victim concerned belonged to a particular national, racial or religious group, or because of the victim's political convictions. In other words, the existence of the *dolus specialis* on the part of the offender must be established.

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(1) See section 2 above, p. 84.

(2) See: (*a*) E. Schwelb, *Crimes Against Humanity*, The British Year Book of International Law, 1946, p. 191; (*b*) J. Litawski, *The Development of the Concept of Crimes Against Humanity*, The History of the United Nations War Crimes Commission and the Development of the Laws of War, London, 1948.

Yet the Polish special legislation dealing with the heritage of war has at great length dealt with the types of offences which come within the notion of crimes against humanity, though not in the technical sense of the term as it is understood by the international enactments. This has, however, been done on a different plane and in a manner somewhat independent from the main trend of international developments which have actually taken place in the sphere of the retributive action against war criminals. We have in mind here the special Decree of 13th June, 1946, *concerning crimes particularly dangerous in the period of the reconstruction of the State* (Official Gazette, No. 30), which contains a number of interesting provisions dealing with such types of acts as to a great extent correspond with crimes against humanity. The definition of those acts has, however, been completely separated from the notion of war crimes as they involve offences committed not in connection with, or during the war, but in peace-time, i.e. after the conclusion of hostilities. Therefore, any further elaboration of this particular type of crimes against humanity is considered to be outside the scope of this report.

Nor does the Polish war crimes legislation contain a definition or reference to *crimes against peace* (except for the case of criminal organizations). This has not, however, been an obstacle preventing the Polish courts from dealing with these types of crimes. In such cases the problem of criminal acts coming within the notion of crimes against peace can easily be solved within the framework of Polish municipal law which is satisfying the requirements of Polish retributive action.

In this respect the Criminal Code of 1932 contains a set of provisions concerning offences against the security and integrity of the State which largely correspond to the *essentialia* of the notion of crimes against peace, and taken in conjunction with the law contained in the Decree of 1946 concerning the establishment of the Supreme National Tribunal have substantially provided a sufficient basis on which the Polish Courts can deal with this type of crimes.

Some of the provisions of the Criminal Code referred to above read as follows :

> *Article* 93, *Para.* 1. " He, who attempts to deprive the Polish State of its independence or to separate part of its territory—is liable to imprisonment for a period of not less than ten years, or for life, or to the death penalty."
>
> *Para.* 2. " He, who attempts to change by force the political structure of the Polish State—is liable to imprisonment for a period of not less than ten years or for life."
>
> *Article* 96. " He, who undertakes steps or action preparatory to the commission of crimes defined in Articles 93, 94 and 95—is liable to imprisonment up to ten years."
>
> *Article* 98. " He, who with the view to commit crimes defined in Articles 93, 94 and 95 :
>
> (*a*) conspires with persons acting in the interest of a foreign State or of an international organization, or

(*b*) assembles armament equipment—is liable to imprisonment for a period not less than five years."

Article 99. " He, who conspires with persons acting in the interest of a foreign State or an international organization with a view to causing acts of war or any other hostile acts against the Polish State—is liable to imprisonment for a period of not less than ten years."

It may also be of interest to recall here that Poland in 1932 was one of the first countries to include in her municipal legislation a measure providing for the punishment of the instigators of the waging of a war of aggression. The relevant Article 113 of the Polish Criminal Code reads :

" *Para.* 1. He, who publicly incites to wage a war of aggression—is liable to imprisonment up to five years.

" *Para.* 2. Prosecution is initiated only if the act defined in Para. 1 is recognized as criminal by the laws of the States against which the incitement is directed."

From the foregoing it will appear that the Polish special legislation dealing with crimes committed in connection with the war comprise in fact all the three categories of war crimes in the wider sense of the term, as envisaged by the international enactments now in force, namely, war crimes proper, crimes against humanity and crimes against peace, although these specific types of crimes have not been specifically defined by Polish law and have only been referred to in a general way in those provisions of the Decree of 1944 which deal with criminal organizations.(1)

II. COURTS AND PROCEDURE

A. The Supreme National Tribunal(2)

1. The jurisdiction, composition and functions of the tribunal

According to Article 6 of the Decree of 1946, the following crimes are within the jurisdiction of the Supreme National Tribunal :

(*a*) Crimes envisaged by the Decree of 22nd January, 1946, concerning the responsibility for the defeat of Poland in September, 1939, and for Fascist activities in public life (Polish Official Gazette, No. 5, item 46) ;

(*b*) Crimes committed by persons, who in accordance with the Moscow Declaration signed by the United States, the U.S.S.R. and Great Britain, will be surrendered to the Polish authorities.

Until 16th April, 1947, when the last changes in the Decree of 1946 came into force, the Prosecutor of the Supreme National Tribunal had the power to exercise discretion in transferring some of the cases within the Tribunal's

(1) As to the place of these international enactments in the Polish municipal law, and their binding force, reference has been made in section 1 *in fine*, p. 83.
(2) For introductory remarks concerning this Tribunal, see section 1, p. 83.

jurisdiction for trial before the common law courts (The District Courts). Since that date, however, this discretion can be exercised only as regards crimes indicated under (*a*) above. This means that henceforth all war criminals who have been surrendered to Poland for trial must be dealt with by the Supreme National Tribunal.

From paragraph (*b*) it follows that the Tribunal is competent to try all offences for which war criminals are surrendered, i.e., offences which come within the notions of war crimes, crimes against humanity and crimes against peace. These offences have, of course, to be adjudicated in accordance with the law laid down in the Decree of 1944, which has been presented and discussed in Part I.

Article 1 of the Decree 1946 provides that the seat of the Tribunal should be the same as that of the Supreme Court, i.e., Warsaw. This, however, is no bar to the Tribunal to hold trials in different parts of the country. In fact, and for obvious reasons, the Tribunal has tried many cases in various districts of Poland, thus pursuing the policy that the more notable war criminals should pay for their abominable deeds in places of their commission. Thus, for instance, the trial of Governor Fischer was held in Warsaw, of Gauleiter Greiser in Poznan, of Gauleiter Forster in Danzig, of the staff members of the Auschwitz concentration camp, in Cracow, and so forth.

The First President of the Supreme Court acts as President of the Supreme National Tribunal. The judges and the prosecutors are appointed by the Præsidium of the National Council on the recommendation of the Minister of Justice from among persons possessing judicial qualifications (Article 3).

The Tribunal sits in public sessions with three professional judges and four lay-judges. The latter are chosen from the list of lay-judges compiled by the Præsidium of the National Council from among members of Parliament. In discharging their functions, the lay-judges are independent and subordinate only to the laws ; at the trial, they have the same rights and duties as professional judges of the Tribunal (Articles 3 to 5).

The sessions of the Tribunal are presided over by the President or by a judge assigned by him. The votes are ascertained by the presiding judge who starts with the youngest in age, and casts the last vote himself (Article 4).

2. TRIAL PROCEDURE

Article 8 of the Decree 1946 lays down the rule that trials before the Supreme National Tribunal are conducted in accordance with the provisions of the Code of Criminal Procedure of 19th March, 1928, subject to the special regulations provided by the Decree.

The special regulations governing the pre-trial procedure contained in Articles 9 and 10 of the Decree read as follows :

> *Article* 9. " 1. In cases coming within the jurisdiction of the Supreme National Tribunal, the Prosecutor of the Supreme National Tribunal

may order the arrest of the accused or impose other movement restrictions. A complaint against the Prosecutor's decision may be lodged with the Supreme National Tribunal.

2. Investigation of crimes may be conducted by the Prosecutor of the Supreme National Tribunal directly, or through the Prosecutors of District Courts, the public security authorities, or the militiamen ; some parts of the investigation may also be delegated by him to the *juges d'instruction* or to the County Court judges.

3. At the instance of the Prosecutor of the Supreme National Tribunal an inquiry can be conducted. Competent to conduct the inquiry is that of the *juges d'instruction* to whom the request has been directed by the Prosecutor of the Supreme National Tribunal.

4. The provisions of Articles 164 para. 1 and 169, 171 and 172 of the Code of Criminal Procedure, and those concerning the rights to object to the indictment shall not apply."

Article 10. " In order to make the impending penalty of confiscation or fine effective, the Prosecutor of the Supreme National Tribunal may seize during the investigation the whole or part of the accused's property. An appeal against the Prosecutor's decision may be lodged with the Supreme National Tribunal."

The articles of the Code of Criminal Procedure mentioned in Article 9 para. 4 above, the application of which has been thus waived in dealing with war criminals, provide that a provisional arrest of a person suspected of a crime or offence can only be made upon the Court's warrant ; they also provide for certain limitations of time in conducting preliminary investigations and inquiries by the Prosecution.

A typical trial before the Polish Courts would be made up of the following parts which would take place in the order indicated :

(*a*) The reading of the Indictment.

(*b*) First speech by the Prosecution, outlining the case.

(*c*) The questions to the accused : " Guilty or not guilty ", and what preliminary explanations he would like to submit to the Court.

(*d*) Statement by the accused or his counsel if desired.

(*e*) Evidence by experts.

(*f*) Evidence by witnesses and of documents produced by the Prosecution including evidence given under cross-examination.

(*g*) Similar evidence for the Defence.

(*h*) Closing address by the Prosecution.

(*i*) Closing address by the Defence.

(*j*) Closing statement by the accused.

(*k*) Additional addresses by the Prosecution and the Defence, and additional statements by the accused, if desired.

(*l*) Adjournment of the Court to discuss and decide the case in camera.

(*m*) The pronouncement of the sentence in open court.

As a rule, all trials are held in public. The Court may, however, order that the whole trial or part of it be held in camera if the proceedings in open court would offend against good morals, cause public disturbance or disclose circumstances which should be kept in secrecy from the point of view of the security of the state or other important public interest. In such cases only a restricted number of persons indicated by the Prosecution and the accused, other than those taking part in the trial, can be present at the proceedings. In any case, the pronouncement of the sentence must be made in open court (Code of Criminal Procedure, Articles 316, 317, 320 and 321).

3. THE POSITION AND RIGHTS OF THE ACCUSED

The Decree of 1946 contains the following provisions :

Article 12. " 1. At the trial, the defendant must appear with counsel. If he does not choose one, the President of the Supreme National Tribunal is to appoint a counsel *ex officio* from among the advocates residing in Poland.

2. Any Polish citizen may be appointed counsel by the defendant ; if, however, the latter seeks to appoint counsel from among persons not mentioned in Article 86 of the Code of Criminal Procedure, such an appointment must be authorized by the President of the Supreme National Tribunal.

3. Any person appointed counsel *ex officio* is entitled to a remuneration for the duties performed and the loss of time involved ; the amount is to be fixed according to the discretion of the Supreme National Tribunal."

Article 13. " 1. The fact that the person to be indicted has not been apprehended is no bar to loding the indictment and to holding the trial in his absence. The judgment will not be regarded as having been given *in absentia.*[1]

2. In cases envisaged in para. 1 :

(*a*) the accused's father, mother, guardian, husband, wife, children, brothers or sisters shall have the right to appoint counsel ;

(*b*) any trial concluded by a valid sentence may be reopened in favour of the person found guilty if new facts and fresh evidence, previously unknown to the Tribunal, are submitted, provided that they establish either in themselves or in conjunction with other facts or evidence, that he is not guilty or has been sentenced for a crime graver than that which he actually committed."

Article 86 of the Code of Criminal Procedure, mentioned above, lays down the rule that only the following persons can act as Counsel before any court exercising its jurisdiction within the frontiers of the Polish State : (*a*) persons appearing on the list of advocates in Poland ; (*b*) professors and lecturers in laws at one of the Polish universities or academic schools approved by the State.

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[1] The latter sentence should be understood in the sense that the provisions of the Code of Criminal Procedure as to conditions and limitations under which such verdicts can be pronounced, are not applicable in war crimes trials.

As to other safeguards of the rights of the accused, it is to be noted that the accused has the right to be present during all stages of the taking of evidence and to make any observations and give any explanations desired by him (Code of Criminal Procedure, Articles 335 and 337).

In the event of a conflict between the interests of several accused charged in the same case, a corresponding number of Counsels for the Defence are appointed (Code of Criminal Procedure, Article 92). In any case the accused cannot have more than three defending Counsels (Article 84).

The accused is, of course, considered innocent until proved guilty. The burden of proof lies entirely with the prosecution. Moreover, it is the duty of the Court to ensure that the case in hand is fully examined.

4. RULES OF EVIDENCE

The accused is under no legal obligation to give evidence himself and if he does so he is not on oath (Code of Criminal Procedure, Article 81). If the statements made by the accused during the trial conflict with his statements during the preliminary investigations, or if he refuses to give any evidence or states that he does not remember certain points, the previous statements can be read before the Court (Code of Criminal Procedure, Art. 340 para. 4). If the accused pleads guilty and makes a confession, it is for the Court to decide whether, and if so to what extent, the evidence should be proceeded with (Code of Criminal Procedure, Article 336).

Witnesses must, in principle, appear in person before the Court during the main hearing of the case. The reading of statements given before the trial is not as a general rule allowed. Some exceptions to this rule are provided in Article 340 of the Code of Criminal Procedure.

However, in so far as trials of war criminals are concerned, the Decree of 1946 lays down in Article 11 the following special rules :

> " *Para.* 1. Any records taken during the preliminary investigation and any public or private documents may be read at the trial.
>
> " *Para.* 2. Any records taken during the preliminary investigation within or without the country by the Polish authorities or by any allied authorities, or made by any private persons acting on their own initiative, or any other evidence given with a view to establishing the crime or bringing the criminal to justice, may be read at the trial."

Witnesses are usually under oath unless the Prosecution and Defence agree that the evidence need not be on oath and the Court considers it unnecessary. The oath is taken before the evidence has been given (Code of Criminal Procedure, Article 108).

5. JUDGMENTS AND APPEALS FOR MERCY

The judgments and decisions of the Supreme National Tribunal are final (Decree of 1946, Article 15).

The judgment must always be prepared in writing and the Tribunal must give the reasons on which it is based. The sentence can be pronounced only after the judgment and its reasons have been finally drafted. The time limit of three days envisaged in Article 367 of the Code of Criminal Procedure

for adjournment of the pronouncement of sentences in complicated cases has, as concerns trials of war criminals, been changed to seven days (Decree of 1946, Article 14).

Persons sentenced in war crime trials have only the right to appeal for mercy to the President of the National Council. In cases where sentence to death has been passed the President of the Supreme National Tribunal shall transmit the files of the case immediately to the Minister of Justice who, in turn, shall submit them for decision, together with the opinion of the Supreme National Tribunal to the President of the National Council. (Decree 1946, Article 15, para. 2.)

The pardon may be complete or partial in the sense that a death sentence may be commuted into imprisonment or a term of the latter diminished.

Sentences and decisions of the Tribunal are carried out by the Prosecutor of the District Court upon request of the Prosecutor of the Supreme National Tribunal (Decree 1946, Article 16). The death sentences can be carried out only after the President has decided that he does not avail himself of his prerogative of pardon (Code of Criminal Procedure, Article 541).

Execution of the death sentence is carried out by hanging.

In certain circumstances prescribed in the Code of Criminal Procedure the execution of a death sentence must be postponed (grave illness, mental cases, pregnant women, etc.).

6. RESUMPTION OF TRIALS

Although the judgments of the Supreme National Tribunal are final in the sense that no appeal is allowed, either of the parties may apply for a resumption of the trial. The Decree of 1946 contains only one provision in regard to this matter, and this is to the effect that on the resumption the Supreme National Tribunal alone may decide (Article 17). Therefore, as to the conditions under which a resumption of the trial may be allowed, the provisions of the Code of Criminal Procedure come into operation. These are the following :

(*a*) *Resumption to the benefit of the accused :*

(i) If it is found that the sentence has been passed following false statements of a witness, expert or interpreter, or has been influenced by a forged document or other evidence, or by bribery ;

(ii) If new facts or evidence came to light which are considered to be likely to lead to the acquittal of the convicted person or to the application of a milder provision of criminal law and/or to a more lenient punishment (Articles 600 and 602).

(*b*) *Resumption to the detriment of the accused :*

Such a resumption can be allowed only for reasons indicated under (*a*) (i) above (Article 600).

There is no limit for the submission of an application for a resumption of the case.

In view of the exclusive jurisdiction accorded to the Supreme National Tribunal, it is clear that if the leave for a resumption is granted, the same Tribunal will have to institute a new hearing of the case, but by different judges.

The Code of Criminal Procedure contains specific provisions as to the circumstances in which, and to what extent, the new sentence can or cannot differ from the previous one (Article 612).

B. Other Courts

Since the Special Criminal Courts for trial of war criminals have been abolished by the Decree of 17th October, 1946, all war criminals other than those dealt with by the Supreme National Tribunal are tried by the common law District Courts and Military Criminal Courts. As regards war crimes cases, all these courts apply the same substantive law as laid down in the Decree of 31st August, 1944. The persons who come under the jurisdiction of these courts are, in principle, war criminals of Polish nationality who committed crimes on Polish territory.

The procedure in these courts is governed by the provisions of the Code of Criminal Procedure with the exceptions provided by special regulations, which are more or less similar in substance to those laid down for the Supreme National Tribunal. The special regulations are the same as those in force for the trial of crimes particularly dangerous in the period of the reconstruction of the Polish State (Decree of 13th June, 1946, and of 17th December, 1946).

Printed in Great Britain under the authority of
HIS MAJESTY'S STATIONERY OFFICE
by COLE & CO. (Westminster) LTD.

7658: Wt. P1647. P.10219. C. & C. (W) Ltd. Gp. 553

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